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FEDERAL COMMUNICATIONS COMMISSION REPORTS (91 F.C.C. 2d)

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Petitions for partial reconsideration of *Report and Order* creating an exemption from the telephone company-cable television cross-ownership rules for telephone companies in rural areas denied. Petitioners presented no new arguments supporting elimination of waiver requirement for telephone company acquisitions and oppositions to franchise renewals that warrant reversal of decision.

—*CATV Cross-Ownership Rules*

CC Docket No. 80–767

Cellular Communications Systems

Commission granted wireline application and designated for hearing the mutually exclusive nonwireline applications to establish cellular systems in Chicago, Illinois. Commission held that equity funding by way of a public offering is a permissible means of establishing financial qualifications for a cellular system applicant. Commission required an applicant to amend its application to conform with cellular rules.

—*Advanced Mobile Phone Service, Inc.*

CC Docket No. 82–721

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Mobile Radio Service, Cellular Applications
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(See: Agreement, Formal—*AT&T Co.*)

Cellular Communications Systems
Domestic Public Land Mobile Radio Service
Mobile Radio Service, Cellular Applications

Commission granted wireline application and designated for hearing the mutually exclusive nonwireline applications to establish cellular systems in Chicago, Illinois. Commission held that equity funding by way of a public offering is a permissible means of establishing financial qualifications for a cellular system applicant. Commission required an applicant to amend its application to conform with cellular rules.

—*Advanced Mobile Phone Service, Inc.*
CC Docket No. 82–721

FCC 82–452

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

ADVANCED MOBILE PHONE SERVICE INC.	File No. 26006–CL–P–(17)–82
For a Construction Permit to establish a cellular system operating on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Chicago, Illinois, modified Standard Metropolitan Statistical Area.	
In re Applications of	CC Docket No. 82–721
ROGERS RADIOCALL, INC. AND	File No. 26040–CL–P–(18)–82
CELLULAR MOBILE SYSTEMS OF ILLINOIS, INC.	File No. 26181–CL–P–(34)–82

For a Construction Permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Chicago, Illinois, modified Standard Metropolitan Statistical Area.

MEMORANDUM OPINION AND ORDER GRANTING APPLICATION AND DESIGNATING APPLICATIONS FOR HEARING

Adopted October 21, 1982; Released November 1, 1982

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT; COMMISSIONER JONES CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA ABSENT; COMMISSIONER SHARP CONCURRING AND ISSUING A STATEMENT.

1. Presently before the Commission are the captioned applications of Rogers Radiocall, Inc. (Rogers), Cellular Mobile Systems of Illinois, Inc. (CMS) and Advanced Mobile Phone Service, Inc. (AMPS). AMPS, CMS and Rogers propose to construct cellular systems to serve the Chicago, Illinois, Standard Metropolitan Statistical Area (SMSA).[1] CMS and Rogers filed Petitions to Deny each other's applications. No petitions to deny were filed against the AMPS application.[2] Responsive pleadings were filed.

2. Because we find that the public interest would be served thereby, we are granting the AMPS application.[3] As discussed below, we find that the Rogers and CMS petitions fail to raise any substantial and material issues requiring designation for hearing. However, the CMS and Rogers applications are electrically mutually exclusive, and accordingly, we are designating those applications for a comparative hearing in accordance with the Commission's *Report and Order* in CC Docket No. 79–318, 86

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[1] As noted in the captions, AMPS, a wholly-owned subsidiary of the American Telephone and Telegraph Company (AT&T), is requesting the wireline allocation (frequency block B) and both Rogers and CMS are requesting the non-wireline allocation (frequency block A) in the Chicago market.

[2] Petitions to defer Commission action on the AMPS application have been filed by Rogers and CMS. *See* paragraph 16, *infra*.

[3] Section 22.901 of our Rules requires that cellular service be provided by an AT&T affiliate only through a separate subsidiary. AMPS has demonstrated in its application that it has met this requirement. Our Rules also require that AMPS submit a cellular capitalization plan for Commission approval. AMPS did submit its plan on May 25, 1982. Our decision here is subject to, and conditioned on, action on the capitalization plan. *See* para. 18, *infra*. We recognize that further approval may be required when ownership in AMPS in Chicago is changed pursuant to the AT&T reorganization.

FCC 2d 469 (1981), *modified, Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58 (1982), and *further modified, Memorandum Opinion and Order on Further Reconsideration*, 90 FCC 2d 571 (1982). We are also requiring that CMS modify its application as set forth below.

Rogers Application

3. In its Petition to Deny, CMS alleges that Rogers did not comply with Section 22.913(a)(5)[4] of the Rules and that it failed to demonstrate that it is financially qualified. CMS argues that Rogers failed to demonstrate that the bank loan on which it relies to finance construction and first year operating expenses will actually be available and that the letter of commitment from the bank does not describe the terms and conditions of the loan.[5]CMS further alleges that Rogers failed to provide reasonable assurance that Metromedia will be able to meet its commitment to Rogers.

4. We have reviewed the application, the pleadings and Rogers' reply.[6] We find that Rogers complied with Section 22.913(a)(5) of the Rules. *See* Volume I of Application, "Response to Section 22.913(a)(5)," and "Technical Response to Petition to Deny," both of which fully address system congestion and cell-splitting. Rogers estimates the cost of construction and first year operating costs to be $19,027,100 which are more than covered by a loan of $20 million from the First National Bank of Chicago. We have reviewed the terms of the First National Bank of Chicago commitment letter and find that, under the applicable precendent, Rogers has shown reasonable assurance that this loan will be available to it. *Multi-State Communications Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Las Vegas Valley Broadcasting v. FCC*, 589 F.2d 594 (D.C. Cir. 1978); *Merrimack Valley Broadcasting Inc.*, 82 FCC 2d 166 (1980).[7]Therefore, Rogers has demonstrated its financial ability regardless of potential contributions from Metromedia.[8]

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[4] CMS alleges Rogers did not adequately describe its basis for determining system congestion as required by our Rules.

[5] CMS also alleges that the letter of commitment from the First National Bank of Chicago refers to Rogers Radio Communications Service (RRCS) and not to Rogers Radiocall, and it makes no reference to the impending acquisition of RCCS by Metromedia. RRCS and Metromedia, Inc. are 50% owners of Rogers.

[6] Rogers submitted an amendment to its financial showing with its Reply on August 10, 1982. This amendment was returned on August 23, 1982, as unacceptable for filing. On September 13, 1982, Rogers filed a Petition for Reconsideration of this action and resubmitted the amendment. The Petition for Reconsideration is hereby dismissed. Our Rules provide that reconsiderations of interlocutory actions by delegated authority will not be entertained. *See* Sections 1.102, 1.106. In any event, as discussed in the order, Rogers has adequately established its financial qualifications in its original exhibits.

[7] We see no merit to CMS's allegation that the letter is addressed to RRCS and not to Rogers, since the letter specifically refers to the proposed cellular telephone system.

[8] Metromedia states that it has allocated $20 million of its cash resources and other credit facilities to support its Chicago proposal. We do not need to rely on that statement here because Rogers has fully satisfied our financial requirements without reliance on the Metromedia commitments.

CMS Application

5. In its Petition to Deny the CMS application, Rogers alleges that CMS is not financially qualified. Rogers argues that the loan commitment from Graphic Scanning Corporation (Graphic)[9] to finance its construction does not provide reasonable assurance that its parent company has sufficient funds since Graphic has numerous applications pending before the Commission in various communication services [10]and has overcommitted its funds in those applications. In addition, Rogers alleges that a $200 million equity offering is not acceptable for demonstrating financial ability and, in the alternative, information concerning the ability of the future stockholders to meet their commitments should be required. Rogers also alleges CMS understated its costs for construction and operation of the proposed facility. Allegations against the financial ability of Graphic and its subsidiaries have been raised in virtually all of the top-30 markets.

6. We first dispose of Roger's argument that Graphic has overcommitted its available funds in view of the numerous non-cellular applications it or its affiliates have pending before the Commission. The simple answer is that Graphic has made the specific unrebutted statement that none of its cellular funds have been allocated for any other project. We do not require more. *See* Section 22.917(b). Thus, this is not a case like those where we have designated issues for hearing when it appeared that an applicant had already committed funds for another project.[11] As for Rogers' more specific allegations concerning the funds available for the CMS cellular ventures, although we here deal specifically with Chicago, we will consider broadly Graphic's ability to finance construction of all 30 systems for which it has applied at a total initial investment of $337 million.[12] The standards we apply are those we have historically used in analgous cases both in the mobile and broadcast areas. As a matter of procedural efficiency and fairness, it is our intention that the following analysis and conclusions put to rest issues concerning Graphic's basic financial qualifications for the top-30 markets to the extent that the issues raised in others are similar to the issues raised here by Rogers. Any financial issues

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[9] CMS is a subsidiary of Graphic.

[10] Graphic has applications pending before the Commission for a Direct Broadcast Satellite System and in the Digital Electronic Message Service, among others.

[11] *Contrast* Jay Sadow, 39 FCC 2d 808 (Rev. Bd. 1973), and Key Broadcasting, 43 FCC 2d 255 (Rev. Bd.1973). Of course, to the extent that Graphic must show financial qualifications for the non-cellular licenses for which it has-or will-applied, it may not rely on the funds committed here for cellular.

[12] It should be noted that Graphic has already announced settlement agreements in Indianapolis and Milwaukee. Thus, in all likelihood it will not incur the full projected cost of those two systems ($5.5 and $6.3 million, respectively). There may well be more settlements, which will further reduce initial capital outlays. Moreover, it is unlikely—though admittedly not impossible—that Graphic will win every comparative hearing. We recognize, therefore, that our financial analysis here is a "worst-case" analysis, albeit one which is required by our Rules and by principles of fairness to all parties to these proceedings.

relevant to specific markets will, of course, be resolved in subsequent orders.

7. CMS estimates its construction and operating costs for one year to be $15,487,000 and relies on a letter commitment for $17,200,000 from Graphic to finance its proposal (Exh. VIII, App. VIII–C). Graphic, in turn, relies on three sources of funds to finance construction of 30 systems by its wholly-owned subsidiaries: (1) its own cash and marketable securities in current asset accounts; (2) a commitment from a group of banks; and (3) an offer by E. F. Hutton to serve as managing underwriter for a public offering of equity and equity-related financings. Although Graphic has explicitly offered CMS financing from internal funds, it is reasonable to assume that Graphic will ultimately choose that combination of sources which best serves the interests of its stockholders and subsidiary companies. We therefore turn to each of these sources.

8. *Internal Funds.* Graphic claims to have "cash and marketable securities in excess of $132 million, of which $100 million has been specifically earmarked by Graphic for cellular development and operation" (Exh. VIII, p. 2). The long-standing Commission standard, however, is not current assets but net liquid assets, that is, the excess of current assets over current liabilities. *Central Texas Broadcasting Co.*, 74 FCC 2d 393, 401–02 (1979); *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 168–69, 174–75 (1980); *WVOC, Inc.*, 32 FCC 2d 765, 769 (Rev. Bd. 1971); *The Tuscarawas Broadcasting Co.*, 4 FCC 2d 466, 468 (Rev. Bd. 1966). Exhibit VIII, Appendix VIII-E, contains Graphic's quarterly Securities and Exchange Commission Form 10–Q for the quarter ended March 31, 1982. The total of cash and marketable securities is $132.9 million,[13] and the total of current liabilities is $25.9 million, yielding about $107 million in net liquid assets. Accordingly, we conclude that Graphic's net liquid assets are sufficient to satisfy its commitment of $100 million to its cellular subsidiaries.

9. *Bank letter.* The Commission requires reasonable assurance that a loan or similar financing will be available to the applicant if it secures a construction permit. *Multi-State Communications, Inc. v. FCC, supra; Las Vegas Valley Broadcasting Co. v. FCC, supra.* Exhibit VIII, App. VIII-E, of CMS's application is a letter from a vice-president of Chemical Bank acting on behalf of itself and six other named lending institutions. The letter states that the banks "have established credit facilities aggregating up to $200 million, for use in connection with Graphic Scanning Corp.'s planned establishment through appropriate subsidiaries of cellular mobile communications systems. . . ." The letter goes on to state that funds will initially be made available upon the grant of any of Graphic's

[13] Graphic's large amount of cash results primarily from its successful sale of $105 million of 10 percent convertible subordinated debentures in December 1981. See Note 3 to Form 10–Q Report.

cellular applications in the form of a revolving credit arrangement convertible to a term loan, whose provisions are stated explicitly. Finally, the letter states that the formal agreement "will include convenants, conditions of availability and security provisions, and will require such documentation, as are customarily included in such agreements." Under the *Multi-State* test, this letter is acceptable as "reasonable assurance" that $200 million will be available to Graphic for cellular construction. The only unknown elements are the specific "customary" conditions, Under *Multi-State*, this lack of specificity does not negate the validity of the commitment.

10. *Equity Financing*. We contemplated that applicants might need or want to obtain equity financing. *See* Section 22.917(e) of the Rules. Nevertheless, the proposal before us is one of first impression. We are unable to find any other case in which an applicant proposed a public offering, as opposed to a private placement of stock in a closely-held company, to support its financial showing. Of course, we have never before licensed such costly terrestrial radio facilities; even the largest VHF television station rarely costs more than $4 or $5 million to build. We believe, therefore, that Graphic's proposal warrants careful analysis.

11. CMS's Exhibit VIII, App. VIII-F, is a letter from the Senior Vice President of E. F. Hutton offering to act as "managing underwriter for $200 million in equity and equity related financings." In addition, CMS appended to its Opposition to Petition to Deny a second letter from E. F. Hutton explaining in further detail how E. F. Hutton reached the conclusions expressed in its first letter. We find that these letters, expressing the expert opinions of a large and experienced investment banking firm, constitute reasonable assurance that a successful public offering can be made. We rely on the following specific representations.

12. First, E. F. Hutton has managed three successful financings on behalf of Graphic in the past two and-one-half years. It is, therefore, familiar with the marketplace's reaction to Graphic's offerings. Second, E. F. Hutton has carefully analyzed Graphic's financial position, current capitalization and future business plans, among other things. On the basis of its analysis, E. F. Hutton is "convinced of Graphic's financial strength and its ability to successfully develop additional, sophisticated communications services including, in particular, cellular mobile radio." Finally, E. F. Hutton states in its second letter that the $200 million figure was the product of careful analysis and professional judgment and that it was determined with knowledge of Graphic's $200 million financing arrangment with the seven banks. Based on these representations, and the absence of any expert opinion to the contrary, we find that Graphic's proposed public offering is a valid method of demonstrating its financial qualifications.

13. *Other Financial Issues.* Rogers also argues that CMS has underestimated the cost of its Chicago proposal. We have long found that the general allegation that one applicant's estimated costs are lower than another's is insufficient to warrant the addition of a financial issue in hearing.[14] Furthermore, CMS's estimates are not unreasonable on their face, and Rogers has failed to raise any serious questions that have not been adequately explained by CMS in its Opposition.[15]

14. *Conclusion.* We find that Graphic and its cellular subsidiaries have provided reasonable assurance that $500 million will be available to cover the $337 million cost of construction of 30 cellular systems in the top–30 markets. The amount committed is sufficiently in excess of the estimated costs to allow for considerable error in the estimates. Accordingly, we conclude that no financial issue should be designated for hearing against any Graphic subsidiary based on the ability of Graphic to finance the construction and operation for one year of 30 cellular systems.

15. *Extension of CGSA.* CMS's proposed Cellular Geographic Service Area (CGSA) extends into the central Rockford SMSA. Pursuant to Rule 22.903(a), a CGSA may not extend into another central SMSA. Therefore, we will require that CMS file a conforming amendment to bring the nonconforming CGSA and 39 dBu contour for cell IL 011028 into compliance with the rules. The amended 39 dBu contour shall not cover any area in the SMSA not previously covered by the nonconforming 39 dBu contour. This amendment should consider the effects, if any, that this change may have on other parts of the application. Due to this circumstance, brief extensions of time may be granted at the discretion of the administrative law judge.[16]

AMPS Application

16. Petitions to defer Commission action on the AMPS application have been filed by Rogers and CMS. We find that it is premature to rule on these petitions at this time. We are not yet in a position to know who will be awarded a license for the nonwireline block of cellular frequencies in this market, and thus to assess what, if any, injury to the public interest may occur as a result of AMPS beginning to provide service before its nonwireline competitor. In addition, petitioners will not be prejudiced by our decision not to address the petitions for deferral at this time so long as those petitions are considered prior to granting a covering license to

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[14] *E.g.*, Salem Broadcasting Co., Inc., 37 FCC 2d 115, 117 (Rev. Bd. 1972).

[15] *E.g.*, Eastern Broadcasting Corp., 28 FCC 2d 28, 29 (Rev. Bd. 1971). The only arguably serious question involves the number of cellular switches, which are expensive, but CMS has fully responded to Roger's allegations.

[16] On September 13, 1982, CMS resubmitted two amendments to modify its Cellular Geographic Service Area (CGSA). Since we are directing a specific amendment to cover this problem, we are returning the amendments under separate cover.

AMPS to provide cellular service. Consequently, we will not resolve the deferral petitions at this time, but will do so prior to granting a covering license. In reaching this decision, we have considered the effect of Section 119 of the Communications Amendments Act of 1982, Pub.L. 97–259, which amended Section 319(d) of the Act. The new law dispenses with the two-step (construction permit-license) radio authorization process for common carrier stations. However, under the new law the Commission may retain the process if we determine that the public interest, convenience and necessity so require. In cellular radio, we find that maintaining the two-step process, at least for the present, would be in the public interest regardless of our ultimate disposition of other public mobile radio services. The two-step process will allow us to deal effectively with the head-start issue in particular cases and will enable us to monitor more closely the construction and development of these systems. We believe it is important to oversee the implementation of cellular, and the existing regulatory procedures will facilitate our doing so.

Conclusions

17. Based on our analysis of the applications and our resolution of the contested issues in this order, we find the applicants to be legally, technically, financially and otherwise qualified[17] to construct and operate their proposed cellular systems. As indicated in our previous discussions, the captioned CMS application does not comply with one of the cellular rules. Due to the new regulatory scheme adopted, neither applicants nor the Commission's staff has had a great deal of experience under the rules. Under these circumstances, we believe that inflexible application of the rules would not be in the public interest. Accordingly, we are requiring CMS to bring its application into conformance with the rules as specified in this order. We emphasize that the amendment ordered here may not be used to give CMS a comparative advantage in the hearing proceeding. In markets for which applications have not yet been filed, strict conformance with the rules will be required, and absent unusual circumstances, the applicants will not be allowed to amend nonconforming applications. We further find that the grant of the AMPS application will serve the public interest, convenience and necessity.

18. Accordingly, IT IS ORDERED that the application of Advanced Mobile Phone Service, Inc., File No. 26006–CL–P–(17)–82, IS GRANTED, conditioned upon the Commission's action on the AT&T Cellular Capitalization Plan submitted on May 25, 1982, as provided by

[17] Although no party has raised the issue here, we recognize that the qualifications of Graphic, CMS' parent, may be in issue in CC Docket Nos. 82–587, *et al.* See note 19, *infra*, for our disposition of this issue.

Section 22.901(d)(3) of the Commission's Rules.[18] 19. IT IS FURTHER ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, that the applications of Rogers Radiocall, Inc. File No. 26040–CL–P–(18)–82, and Cellular Mobile Systems of Illinois, Inc., File No. 26181–CL–P–(34)–82, ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING upon the following issues:[19]

(a) to determine on a comparative basis the geographic area and population that each applicant proposes to serve;[20] to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(b) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner

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[18] The authorization also will be conditioned upon AMPS obtaining the appropriate antenna structure clearances. AMPS will not be authorized to render service to the public during service tests even after it files FCC Form 403 for a license to cover. Service to the public cannot commence until the covering license becomes effective. Equipment tests, however, may be conducted. AMPS' authorization (FCC Form 463) will reflect these conditions.

[19] There are two issues that are not to be considered in the comparative hearing. The first is the financial qualifications of the applicants. Financial ability is a basic rather than a comparative qualification for cellular licensing. Cellular Communications Systems, 86 FCC 2d 469, 501–02 (1981). We have found both of the applicants included in the comparative hearing to be financially qualified. The second issue not to be considered is the qualifications of Cellular Mobile Systems of Illinois, Inc. or its parent Graphic, to the extent that such qualifications may be affected by the issues included in the Commission's order designating certain 35 and 43 MHz paging applications for hearing. A.S.D. Answer Service, Inc., *et al. (ASD)*, FCC 82–391, released August 24, 1982. Those issues will be thoroughly reviewed in that separate proceeding and should not be reargued in the context of a cellular hearing. Because of the extreme importance and unequivocal finding of immediate need for cellular service, 86 FCC 2d at 489–90, we are unwilling to delay these proceedings until we take final action in *ASD*. In recognition of the importance of *ASD*, we plan to direct the ALJ to resolve it in an expedited manner and to require that exceptions to the initial decision be taken directly to the Commission. *Contrast* Questions Concerning Basic Qualifications of Broadcast Applicants, 28 RR 2d 705 (1973), Grayson Enterprises, Inc., 79 FCC 2d 936 (1980), and the applicability of Grayson in Little Rock Telephone Company. Inc., 89 FCC 2d 400 (1982). As set forth in para. 26, *infra*, the Commission reserves the right to reexamine and reconsider the qualifications of Cellular Mobile Systems of Illinois, Inc. to hold a cellular license should *ASD* be resolved adversely to any of CMS's affiliate or parent companies or to any of their principals. *Accord*, Satellite Television Corporation, FCC 82–427, released October 13, 1982, at para. 95–6. To implement our decision, we direct the administrative law judges in this and other cellular proceedings in which Graphic's affiliates are involved to condition any award to take account of any action the Commission may take. The administrative law judges are further directed to disregard the *ASD* proceeding for all other purposes in these cellular dockets. In this connection, we note that Rogers is already a party in *ASD* and can adequately protect its interests there.

[20] For purposes of comparison, the geographic area that an applicant proposes to serve includes that area within the proposed 39 dBu contours which, in turn, falls within the proposed Cellular Geographic Service Area and the relevant Standard metropolitan Statistical Area. Consideration should be given to the presence of densely populated regions, highways and areas likely to have high mobile usage characteristics as well as indications of a substantial public need for the services proposed. *See* 86 FCC 2d at 502.

within its proposed CGSA in order to meet anticipated increasing demand for local and roamer service;[21]

(c) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities);[22] and

(d) to determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

20. IT IS FURTHER ORDERED that the Separated Trial Staff (the Hearing Division and other individuals specifically designated) of the Common Carrier Bureau is made a party to the proceeding.[23]

21. IT IS FURTHER ORDERED that the applicants shall file written notices of appearances under Section 22.916(b)(3) of the Commission's Rules within 10 days after publication of this order in the Federal Register.

22. IT IS FURTHER ORDERED that the hearing shall be held according to the procedures specified in Section 22.916 of the Rules, except as otherwise noted here, at a time and place and before an administrative law judge to be specified in a later order.

23. IT IS FURTHER ORDERED that exceptions to the initial decision of the Administrative Law Judge under Section 1.276 of the Commission's Rules shall be taken directly to the Commission.

24. IT IS FURTHER ORDERED that Cellular Mobile Systems of Illinois, Inc. is directed to file the conforming amendment specified in this order within 15 days after publication of this order in the Federal Register and that all applicants are directed to file rebuttal cases under Section

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[21] In making this comparison, preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems. *See* 86 FCC 2d at 502–03.

[22] *See* 86 FCC 2d at 503 for a discussion of the relative importance of the evidence submitted under this issue.

[23] Members of the Separated Trial Staff are non-decision making personnel and they will not participate in decision making or agency review on an *ex parte* basis in this case, either directly or through contact with other Common Carrier Bureau personnel. Any investigative or prosecuting functions will be performed by the Separated Trial Staff in connection with its role as a party to the adjudication of these cellular radio applications. All other personnel of the Common Carrier Bureau, unless identified in a subsequent order as required to be separated, are designated as decision-making and they may advise the Commission as to the ultimate disposition of any appeal of an Initial Decision in this proceeding. *See* Communications Act of 1934 as amended § 409(c) (47 U.S.C. § 409(c); Administrative Procedure Act § 554(d) (5 U.S.C. § 554(d)); Section 1.1221 of the Commission's Rules.

22.916(b)(4) of the Rules within 45 rather than 30 days after publication of this order in the Federal Register.

25. IT IS FURTHER ORDERED that the Petitions to Deny filed by Rogers Radio Call, Inc. and Cellular Mobile Systems of Illinois, Inc. ARE DENIED, and the Petition for Reconsideration filed by Rogers IS DISMISSED.

26. IT IS FURTHER ORDERED that any authorization granted to CMS as a result of the comparative hearing shall be conditioned on, and without prejudice to, reexamination and reconsideration of that company's qualifications to hold a cellular license following a decision in the hearing designated in *A.S.D. Answering Service, Inc., et al.*, FCC 82–391, released August 24, 1982, and shall be specifically conditioned upon the outcome of that proceeding.

27. IT IS FURTHER ORDERED, that any authorization granted as a result of this proceeding shall be conditioned upon obtaining the appropriate antenna structure clearances and Canadian coordination where needed.

28. The Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

SEPARATE STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

IN RE: CELLULAR MOBILE RADIO APPLICATIONS TO SERVE CHICAGO, ILLINOIS

With this *Memorandum Opinion and Order* the Commission demonstrates its commitment to providing cellular mobile radio service to the American public as quickly as possible.

The Commission has delegated to our Common Carrier Bureau the authority to act on all other pending cellular applications, including the authority to issue construction permits in those markets where no mutual exclusivities are present. With this delegated authority the Bureau is now in a position to act swiftly on the remaining top–30 market applications and on the applications to be filed for the rest of the nation's cellular markets. Pursuant to this procedure, it is expected that all applications in the top–30 markets will be acted upon, either by grant or by hearing designation, no later than the end of this year.

I take this opportunity again to urge negotiation and settlement by mutually exclusive cellular applicants to avoid the delay of comparative hearings—delay which will only work to the detriment of the consumer and public interest in the expeditious provision of cellular service. As quickly as complete market settlements are reached—on either side of the split frequency allocation—and filed with the Commission, just as quickly will the Commission act to make the requisite finding that such settlements are in the public interest and to grant construction permits. Our policy favoring strong competition between wireline and non-wireline cellular systems, as well as our objective of expediting the offering of cellular service to the consumer, will be served best by mutually exclusive applicant settlements.

October 28, 1982

CONCURRING STATEMENT
OF
COMMISSIONER ANNE P. JONES

IN RE: CELLULAR MOBILE RADIO APPLICATIONS TO SERVE CHICAGO, ILLINOIS

Cellular communications systems promise the American consumer a new dimension in telephone service. They will make portable telephone communications for both business and personal use more widely available than heretofore possible with a substantial improvement in the quality of service. Cellular systems will provide business and industry an important tool for improving the productivity of decision-makers who must travel extensively in their work, and also make it easier for families to remain in touch.

Since the potential benefits of cellular systems for both business and personal use appear so substantial, the Commission has placed a high priority on making this new telephone service available to the public as rapidly as possible.[24] To achieve this objective, the Commission decided that two 20 MHz Cellular systems should be authorized per market, with one block of frequencies authorized for the local wireline carrier(s) and the other block for non-wireline carriers. This allocation plan will presumably speed delivery of cellular service, since comparative hearings for the wireline frequency blocks can probably be avoided in most cases. While such a frequency allocation plan may confer a head-start advantage on wireline carriers, the Commission believed that this problem could be addressed on an *an hoc* basis through a brief moratorium on cellular

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[24] *Cellular Communications Systems (Reconsideration)*, 89 FCC 2d at 70 (1982).

service provided by wireline carriers in cases where such a moratorium was justified. In brief, the Commission found and affirmed that ". . . the immediate need for cellular service outweighed the possible anticompetitive effects of allowing wireline carriers to enter a market before non-wireline carriers."[25] Thus, while the Commission in its cellular policy has attempted to introduce a modicum of facilities-based competition into cellular communication markets, it has also made the deliberate decision that expedited delivery of cellular service to the American public by wireline carriers justifies the risk of handicapping competitive entry by non-wireline carriers.

By its decision to grant a construction permit, but not operating authority, to Advanced Mobile Phone Service, Inc. (AMPS) in this case, the Commission has subjected AMPS in the Chicago modified Standard Metropolitan Statistical Area to the possibility of additional procedural delay. Having denied the petitions for deferral at this time, the Commission must consider the merits of such petitions when it considers the grant of operating authority to AMPS. However, Section 119 of the Communications Amendments Act of 1982 allows the Commission to dispense with the two-step radio authorization process for common carrier stations. By granting both construction and operating authority as permitted by this provision, the Commission could have cleared the final procedural obstacle blocking rapid introduction of cellular service to the people of Chicago. To remain consistent with its goal of speeding introduction of cellular service to the public, the Commission should have granted AMPS both construction and operating authority simultaneously, rather than bifurcate the licensing procedure.

Therefore, I concur with the Commission's decision to grant AMPS construction authority. I remain concerned, however, that the Commission's two-step licensing procedure may compromise the expedition of cellular service, a goal that a majority of the Commission has consistently supported in this important proceeding.

Concurring Statement of Commissioner Stephen A. Sharp

Re: Cellular Mobile Radio Applications to Serve Chicago, Illinois

In this proceeding, the Commission has time and again expressed the overriding need to bring cellular mobile radio service to the public as quickly as possible. This perception of the public need was the basis both

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[25] *Ibid.*, p. 89.

for the set-aside of frequencies for exclusive use by wireline carriers and for its not too subtle "suggestion" that multiple applicants should settle their competing applications through mergers or buy outs. Thus, there is a need for the Commission to be both consistent and forceful in its determination that expedition is a matter of the highest priority; the need for expedition outweighs any fears over the effect of headstarts on the competitive posture of applicants for the non-wireline frequencies who have been unable or unwilling to settle their differences.

Today, however, the Commission retreats from its commitment to bring cellular mobile service to the public as quickly as possible by delaying consideration of the headstart issue in the Chicago market to an unspecified future date when the wireline applicant files an application for a license to cover the construction permit we have granted it today.[26] By doing so, the Commission introduces new uncertainties which have the potential for delaying cellular service to the public.

First, the refusal to deal with the headstart issue now undercuts the Commission's position that the need for service outweighs competitive concerns raised by the wireline carrier's early entry into the market for cellular communications. Second, it creates an incentive not to settle among those carriers whose applications are mutually exclusive and thus subject to a comparative hearing since it holds out the possibility that the wireline's entry into the market will be delayed. This is the wrong incentive since the Commission should do everything possible to encourage settlements. Third, it creates uncertainties for the wireline carrier who must commit millions of dollars to finance a full-scale, commercial cellular system without knowing whether it will be able to begin to recover its investment once construction is complete.[27]

An additional problem is created by the use of the covering license application as the procedural vehicle for reaching policy issues which should be resolved either in the decision to grant or deny the construction permit or in response to a petition for special relief. For good reason a license has been granted routinely where a transmitter has been constructed in accordance with the specifications approved in the construction permit and has been tested to demonstrate such conformity. The "two-step" process established by § 319 never contemplated two

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[26] The Commission indicated that it would consider a temporary moratorium on wireline cellular service upon a specific showing why a wireline carrier's headstart would not be in the public interest. *See* Cellular Communications Systems, 86 FCC 2d 469, 491 n. 57 (1981), *recon.* 89 FCC 2d 58, 72 (1982).

[27] If a moratorium were imposed upon issuance of the construction permit, the carrier would not draw down construction funds until the moratorium expires and construction begins. A moratorium imposed after construction forces the carrier to continue to pay interest on funds expended and other overhead costs, needless waste which will be paid for ultimately by the consumer.

separate proceedings for consideration of substantive issues.[28] The Commission will regret the delays created by injecting another step into the process of delivering service to the public, a step wisely eschewed over the past 50 years. To suggest that this new step will speed service to the public is little more than wishful thinking.

[28] A grant of a construction permit is a final agency order subject to judicial review. By adding substantive issues to the decision to issue a license that order also will be subject to judicial review.

Deposition
Discovery
Document, Production of
Hearing, Conduct of
Information, Request for
Rules, Amendment of

Part 1 of Rules amended to permit the commencement of discovery before or after the initial prehearing conference; to permit the use of recorded depositions in appropriate cases; and to provide for the production of documents from non-parties to Commission proceedings without requiring a deposition of the non-party.
—*Amendment of Part 1*

FCC 82–450

Before the

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part I, Rules of Practice and Procedure To Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1982; Released: November 10, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has under consideration a "Report on Evaluation of the Federal Communications Commission's Discovery Procedures in Adjudicatory Hearings" (hereafter Report).[1] We have found it extremely helpful in our reevaluation of the discovery process. As a result of this review, we have carefully considered the Report and its recommendations and have concluded that the existing discovery rules are basically sound

[1] The 96 page report was prepared by Max D. Paglin, Esquire, under contract to the Commission, and was submitted on October 30, 1980. Copies of the report are available for public inspection in our Library, Room 639, 1919 M Street, N.W., during normal business hours. Copies are also available for a fee from the Commission's commercial contractor for photocopying.

and effective and should be retained, but that three of them should be amended.[2] The other rules are not being changed at this time because we are not persuaded that they need to be changed in order to accomplish the original goals of the rules, namely, to make adjudicatory hearings both shorter and more productive. *See Report and Order on Discovery Procedures*, 11 FCC 2d 185 (1968).

2. In order to understand why we are changing some of our discovery rules and not others, we will first review the existing rules and then summarize the Report. After that, we will discuss the changes we are making. Finally, we will review the other recommendations made in the Report and explain why we are not adopting them.

The Commission's Existing Discovery Rules

3. The Commission's very broad and general discovery rules are derived in part from the Federal Rules of Civil Procedure, which provide for both discovery and the production and preservation of evidence. *See Report and Order on Discovery Procedures, supra.* Section 1.246, entitled "Admission of Facts and Genuineness of Documents," contains a procedure for reaching agreement on the issues prior to hearing. The *Jencks* rule (Jencks v. *United States*, 353 U.S. 657 (1957)) is codified in Section 1.362, which provides for the production of statements by witnesses. Procedures governing discovery and the production and preservation of evidence for use at the hearing are found in Sections 1.311 through 1.325.[3] Sections 1.311 and 1.313 apply generally to the various discovery procedures available. Section 1.315–1.319 govern the taking of depositions, and Section 1.321 provides for their use at the hearing. Section 1.323 applies to interrogatories to parties to be answered in writing. Section 1.325 provides for the production of documents and things. Commission records are not subject to discovery under Section 1.325, but may be available under the Freedom of Information Act (5 U.S.C. 552) and pertinent Commission rules (Sections 0.451–0.467). Collateral subpoena procedures are provided for in Section 1.333.

4. In general, the scope of discovery in adjudicatory hearings is regulated on a flexible, case by case basis. Notable exceptions to the flexible approach pervading the discovery rules are the requirement of "relevancy" to specified issues and certain privileged information. Section 1.311. The Commission has placed responsibility for applying the discovery rules primarily upon the presiding administrative law judge, who has broad authority to supervise the use of discovery procedures and the power, by use of protective orders (see Section 1.313), "to preclude any

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[2] The new rules are set forth in the attached appendix.

[3] These rules "provide discovery procedures to facilitate preparation for the hearing, eliminate surprise, and promote fairness." 11 FCC 2d at 186.

use, or particular uses, of these procedures in a particular case if he finds that their use will not contribute to the proper conduct of the [hearing] . . . ." *Report and Order on Discovery Procedures, supra* at 187. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *reconsideration denied*, FCC 81–235, released May 12, 1981, *affirmed per curiam*, 679 F.2d 261 (D.C. Cir. 1982); *Chronicle Broadcasting Co.*, 20 FCC 2d 774 (1969). Neither the Commission nor the Review Board will upset a discovery ruling of a judge absent a strong showing that the ruling is arbitrary, capricious, fundamentally in error or is in disregard of the rights of the parties. *See, e.g., Sumiton Broadcasting Co., Inc.*, 18 FCC 2d 78 (1969); *Florida-Georgia Television Co., Inc.*, 14 RR 2d 365 (1968).

The Report on Evaluation of the Commission's Discovery Procedures

5. The subject Report is based on a lengthy and comprehensive study of the discovery procedures. The purpose of the study was to examine, analyze and evaluate the functioning of the procedures since they were adopted fourteen years ago to determine whether they had been accomplishing their intended purposes. Much data and information was compiled during the study, including a questionnaire that was sent to Commission attorneys, the administrative law judges, members of the outside bar, and representatives of public interest groups. Based on its analysis of the data, the Report concludes that the current discovery rules are basically sound, but that there are four principal areas which might warrant new approaches and revisions for extending and simplifying the discovery process. Those areas are:

(a) *Role of the Administrative Law Judges.* The Report recommends enhancing and emphasizing the importance of the judge's role and active participation in, and close supervision of, the discovery process.

(b) *Sanctions.* The Report recommends expanding the nature and scope of the sanctions available to the judge in situations of abuse of, or improper action in connection with, discovery.

(c) *Scope of Discovery.* The Report recommends revising the criteria for the permissible scope of discovery.

(d) *Time Periods.* The Report recommends revising the time periods and forum for commencement and conduct of discovery.

6. The Report emphasizes the role of the presiding judge in the discovery process, and, in general, recommends that the judge should: supervise the discovery process more closely; issue more prompt and firm rulings on discovery; strictly enforce the time periods imposed by the rules; limit the number and duration of interrogatories and depositions or terminate examination where required; and encourage informal exchanges, admissions, stipulations and resolution of disputes concerning the scope of the issues.

7. A number of specific changes in the Commission's Discovery Rules has been proposed. We have reviewed the proposed rules changes and have decided to adopt three of them. The three changes have to do with commencement of discovery in adjudicatory hearings, the use of recorded depositions in appropriate cases, and the production of documents from non-parties. The other recommended rules changes are not being adopted at this time because, in many cases, the judges now have the authority to take the recommended actions to control the discovery process, and we do not believe codification of this authority is necessary to ensure its effective use. Basically, we are satisfied that the existing rules are sufficiently flexible to achieve the overall purpose of the rules and to prevent unfairness.

The New Rules

8. First, we have decided to revise Section 1.311(c) to provide that discovery in all hearing cases may be initiated either before or after the initial pre-hearing conference provided for in Section 1.248 of the Rules. The timing of discovery would depend on the particular facts of each case. Presently, the rule provides that discovery must be initiated before the initial pre-hearing conference, which usually takes place within two months of designation for hearing. This rigid and inflexible rule has proven to be unrealistic, and has been honored more in the breach than in the observance. The proposed change is realistic and sensible, and conforms to the practice now followed in most hearing cases.[4] However, we wish to emphasize that the permissiveness and desired flexibility of the new rule should not lead parties to believe that they can be dilatory and delay discovery. The judges are urged to take firm control of the discovery process and to encourage the commencement and completion of discovery at an early date.[5] Abuses of this rule should not be tolerated by the judges, who have the means available under the present rules to prevent and stop abuses.

9. Second, we will amend Section 1.318(c) of the Rules by authorizing the permissive use of telephonic and electronically recorded depositions, including videotape, in addition to the methods presently provided for in Sections 1.315 and 1.318–1.321, but only where approved by the presiding judge. As the Report points out, this change would serve the interests of economy, efficiency and expedition. The Commission's processes and the public interest would be protected because the presiding judge would

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[4] The Report also recommends the establishing of separate "special conferences" on discovery. We have concluded that this formalization is unnecessary in light of the judges' authority to schedule conferences whenever they would be useful. *See* para. 17, *infra*.

[5] The Judges already have the authority to set dates for the commencement and completion of discovery. That authority will not be upset in the absence of a clear showing of arbitrariness, capriciousness, fundamental error or disregard of the rights of the parties.

have to approve the procedure. *Cf.* Sections 1.248(f) and 1.364 of the Rules; *Amendment of Part 1 of Rules*, 69 FCC 2d 1078 (1978).

10. Third, we are also revising Section 1.333(b) of the Rules to change the procedure for the production of documents from non-parties to Commission proceedings. The rule is being amended to authorize the presiding judge to issue separate subpoenas for the production of documents from non-parties without requiring an accompanying deposition. The rule presently provides that the only way to obtain documents from non-parties is by issuance of a subpoena *duces tecum* in connection with a deposition notice. It is not necessary in some instances, however, to depose the non-party in order for him to furnish the documents. The present procedure is needlessly cumbersome and expensive and is being changed for those reasons.

The Report's Other Recommendations

11. The Report makes a number of other thoughtful suggestions for changing the discovery rules. Most of the suggestions arise out of what could be characterized as the central theme of the Report, namely, that the administrative law judges should be more intimately involved in the discovery process. We agree with the general view that administrative law judges should take and retain firm control of adjudicatory proceedings, including the discovery process, and we wish to remind all concerned that the judges have "full control over the use of [the discovery] procedures." *Report and Order on Discovery Procedures, supra* at 187. As we said when we adopted the discovery rules, "it is within [the judge's] power to preclude any use, or particular uses, of these procedures in a particular case if he finds that their use will not contribute to the proper conduct of the proceeding, and he has adequate authority to prevent use of the procedures for purposes of delay and to prevent the abuse of parties or witnesses." *Id.* We here reaffirm that grant of discretionary power to the judges, and we remind them of their responsibility to exercise firm control of adjudicatory proceedings, including the discovery procedures.[6]

12. Nevertheless, we continue to believe that the existing rules are flexible tools available to all parties to Commission hearings. Viewed in this light, we have carefully examined the Report's various other recommendations and have decided not to adopt them at this time. First, we do not believe it would be sound policy to authorize the judges to order depositions of Commission personnel for purposes of discovery. Section 1.311(b)(2) now provides that Commission personnel may be deposed only

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[6] *Cf. Equal Employment Opportunity Commission*, 38 FCC 2d 33 (1972).

by special order of the Commission.[7] The reasons for this restriction were stated by us in 1968 and are still valid today:[8]

> At any one time, there are numerous hearing cases pending before the Commission. A multiplicity of demands on the Commission's limited staff would seriously interfere with its capacity to discharge its regular duties. The Commission is in this respect in a different position from that of private parties, who will normally be called upon to give depositions only in the single case in which they are participating. Furthermore, the written interrogatory may well be the most useful of the several procedural devices, since a party may, in one set of interrogatories, obtain an answer to each of his questions from the person best able to furnish it, without time-consuming questioning to determine in advance the particular staff member who has knowledge of the facts. 11 FCC 2d at 188.

13. Second, it is recommended that we authorize the judges to grant requests by parties for production of non-public Commission records in connection with a party's preparation for hearing. The rules now require such a showing to be made to the Commission, Section 1.311(b)(3), and we see no need to change that requirement. The present rule provides for much desired uniformity in this very sensitive area and does not impose an undue hardship or prevent parties from obtaining non-public documents in appropriate cases. *See, e.g., Central Alabama Broadcasters, Inc.*, 70 FCC 2d 1762 (1979). *Cf. NTV Enterprises, Inc.*, 62 FCC 2d 722 (1976).

14. Next, it is suggested that the judges be given the authority to impose a variety of new specific sanctions if parties fail to comply with valid discovery orders. However, we believe that the various sanctions now available to the judges are adequate to prevent or stop abuses of the discovery rules. Moreover, there have not been a significant number of abuses of the discovery rules since they were adopted in 1968. To the contrary, our review of the cases over the years shows that the existing rules have worked quite well and that the overwhelming majority of discovery cases involves no abuses at all. Those very few cases where abuses have occurred have resulted in appropriate sanctions being imposed on the violaters.[9]

15. We are taking this opportunity to remind all parties to our adjudicatory hearings that abuses of our discovery rules or violations of valid

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[7] Commission personnel may, of course, be questioned for purposes of discovery by written interrogatories pursuant to Section 1.323. However, the rules permit only limited questioning of Commission personnel. *See* Section 1.311(b)(4). That rule, with its limitations, continues to be sound and will not be changed.

[8] This does not mean that Commission personnel can *never* be deposed. It simply means that, in order to justify such an unusual deposition, the Commission must order it. This provides for uniformity in this very sensitive area. On the other hand, it does not prevent parties from legitimately discovering facts from Commission personnel in appropriate circumstances, and it does not detract from the otherwise plenary authority of the judges in cases of discovery.

[9] *See Faith Center, Inc., supra* (television license renewal application dismissed); *Vue-Metrics, Inc.*, 69 FCC 2d 1049 (1978), *affirmed per curiam*, 615 F.2d 1369 (D.C. Cir. 1980) (television construction application dismissed). A non-applicant party could be barred from further participation.

discovery orders will not be tolerated. The judges have had ample authority since 1968 to prevent abuses in the first instance or to stop abuses when they have occurred. The authority of the judges over the discovery procedures has been and continues to be very broad. We encourage them to use the tools that are available[10] to assure the continued vitality, integrity and usefulness of the discovery procedures, and to expedite proceedings to the fullest extent possible.[11]

16. It is also recommended that Section 1.362 be amended to authorize the judges, upon the request of any party, to direct that witness statements be furnished to all parties at an appropriate time *prior* to the witness' appearance at the hearing. Under existing Commission practice, "the statements of witnesses who will testify are normally made available a week or so prior to commencement of the hearing (if disclosure is requested), although the rules (Section 1.362) require disclosure only afer the witness has testified." *Amendment of Part 1 of Rules*, 81 FCC 2d 281, 284 (1980). (Footnote omitted.) *But see Gilmore Broadcasting Corp.*, 69 FCC 2d 2105, 2108 (1978). The compelling reasons for not changing the rule (Section 1.362) were stated by us in a Memorandum Opinion and Order released on September 10, 1980. *Amendment of Part 1 of Rules*, *supra*, 81 FCC 2d 281. There, we said:[12]

> It would be diffcult to obtain the cooperation of witnesses if we were unable to promise that their statements would be kept confidential until they have testified or are about to testify. In many cases, witnesses cooperate and give testimony, even though they are concerned about the personal consequences such as current job security and ability to obtain jobs with other employers. . . Once they are called to testify, they are sworn and cannot as readily be blamed by the licensee for truthfully answering the questions posed. Absent that protection, testimony would be unobtainable, crippling our investigative process.
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> Aside from the chilling effect on prospective investigations, the two most important reasons for not disclosing witness statements until the witness has testified, or at least until shortly before he is called to testify, are that the licensee may intimidate the witness, and/or construct a false defense. See, *e.g.*, *Chronicle Broadcasting Co.*, 19 FCC 2d 240 (Rev. Bd. 1969).
>
> . . . we believe that the Commission's procedures strike a balance between full disclosure and protection of the interests of parties and witnesses found in judicial and other agency proceedings. Licensees are not inherently more believable than witnesses. Determining the truth is the function of the hearing. Licensee's counsel is fully informed concerning allegations against his client well in advance of designation and is given a list of witnesses interviewed by staff investigators. Thus, counsel is already afforded an opportunity for meaningful investigation of the allegations and preparation

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[10] *E.g.* the authority to compel a party to answer interrogatories (Section 1.323(d)) or the authority to ultimately dismiss an application for failing to comply with a valid order (*Vue-Metrics*, *supra*).

[11] *Cf. Tinker, Inc.*, 4 FCC 2d 372, 374 (1966).

[12] 81 FCC 2d at 285. *See also Walton Broadcasting, Inc.*, 56 FCC 2d 814 (1975); *Chesapeake-Portsmouth Broadcasting Corp.*, 52 FCC 2d 854 (1975).

for cross-examination. Moreover as a matter of practice the Broadcast Bureau makes witness' statements available prior to hearing.

17. It is recommended that we expand the concept of pre-hearing conferences to provide for "special" conferences on discovery. This would give the judge and the parties the opportunity to focus soley on discovery and to expedite the proceeding. This point is well taken, but the change is unnecessary because, at present, discovery is generally discussed (sometimes at great length) at the initial conference. With the current crowded hearing calendars, it would be undesirable to require a further conference, entailing, *inter alia*, the time of the judge, Commission counsel, outside counsel, and a court reporter. If further pre-hearing conferences to discuss discovery or anything else are necessary or desired, the existing rules are sufficiently flexible and allow the judge to order them. *See* Sections 1.243(f), 1.248 and 1.311(c).[13] In practice, such conferences are held in many cases and are useful.

18. Next, it is recommended that we eliminate or strictly limit discovery in what is characterized as "routine" comparative cases. However, our experience under the present rules teaches us that discovery is potentially useful in *all* hearing cases, including apparently "routine" cases, which can easily develop into not-so-routine ones.[14] Besides, if a party abuses or attempts to abuse the discovery procedures, the present rules provide a considerable measure of protection by authorizing protective and other orders. *See, e.g.*, Section 1.313; *cf. Vue-Metrics, supra.*

19. It is also suggested that we adopt a rule prohibiting the use of information obtained through discovery to support petitions to enlarge issues, unless a persuasive showing can be made that the information so discovered would significantly and decisively affect the outcome of the case. At present, petitions to enlarge based on "new facts or newly discovered facts," including facts obtained through discovery, are presently allowed if filed within fifteen days after such facts are discovered, Section 1.229(b).[15] Nevertheless, the Commission's existing policy is to prohibit "the use of discovery to ascertain whether grounds exist for enlargement of the issues." *Report and Order on Discovery Procedures,*

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[13] Section 1.311(c), in particular, now provides that, "The presiding officer may *at any time* order the parties or their attorneys to appear at a conference to consider the proper use of [the discovery] procedures or the time to be allowed for such use." (Emphasis added.)

[14] We have chosen to limit the use of discovery, however, in certain specific types of proceedings in order to expedite the licensing of new services, such as low power television (if lotteries are not eventuallyutilized), cellular mobile phone systems, and 800 MHz radio. *See Low Power Report and Order*, 47 Fed. Reg. 21468 (1982); *Cellular Communications Systems*, 86 FCC 2d 469, 499 (1981), *procedures modified in part on reconsideration*, 89 FCC 2d 58, 92 (1982); *Second Report and Order*, in the 800 MHz proceeding, 47 Fed. Reg. 41002 (1982); Section 22.916(b)(6) of the Commission's Rules.

[15] Late-filed petitions to enlarge are tested under Section 1.229(c) of the Rules.

supra at 187.[16] The two policies are not necessarily mutually exclusive nor should they be. While it is improper for a party to use the Commission's discovery procedures primarily to obtain information for a petition to enlarge, it is not improper for a party in the course of legitimate discovery to unearth information that is relevant to the public interest and then ask for issues based on that newly disclosed information. The former is an abuse of discovery and is prohibited under our present policy. The latter is permitted under our rules.[17] State otherwise, if a petitioner uncovers information about an applicant that is relevant to the public interest and the petitioner presents that information to the Commission in a timely filed petition to enlarge issues, the Commission presently considers the merits of the petition, even if the underlying facts are derived from discovery. *See, e.g., RKO General, Inc.*, 48 FCC 2d 397 (1974). If there are abuses of discovery, they can be corrected by other means available under the existing rules. We see no need for adopting a more stringent test for petitions based on discovery, as the Report recommends, than for untimely petitions, as governed by Section 1.229(c).

20. We are also urged to shorten the time periods for notice, oppositions and motions for protective orders in connection with depositions and interrogatories. While there is some merit to this proposal it is not being adopted because the existing time periods are "reasonable." *Report and Order on Discovery Procedures, supra* at 191,[18] and have not been abused. We do not believe the proposed time periods are necessarily more reasonable. In any event, we expect the judges to strictly enforce the time periods imposed by the rules and, if appropriate in any particular case, to impose different time periods.

21. Another recommendation is to eliminate the use of oral depositions of parties or principals in an application, except in renewal and revocation cases, unless a persuasive showing can be made that interrogatories are inadequate. While oral depositions may not be necessary in many cases, we believe that restricting their use by rules is unnecessary and undesirable for several reasons. Under our existing rules, the judges have suffi-

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[16] The Commission made clear in 1968 that the scope of discovery would be limited to matters relevant to the specified hearing issues, and that, under no circumstances, would a party be permitted to utilize discovery to ascertain whether there are grounds for enlarging the issues. *Id.*

[17] If a party uncovers information about an applicant's qualifications, in the course of discovery or not, and that party deliberately withholds theinformation from the Commission, under certain circumstances that could be considered an abuse of the agency's processes. *See Home Service Broadcasting Corp.*, 24 FCC 2d 192, 193 (1970). *Cf. James C. Sliger*, 70 FCC 2d 1565, 1571 (1979), *review denied*, FCC 79–548, released July 26, 1979, affirmed sub nom. Cumberland Broadcasting Corp. v. *FCC*, 647 F.2d 1341 (D.C. Dir. 1980). *But see Gulf Coast Communications, Inc.*, 81 FCC 2d 498 (1980), *precon denied*, FCC 81R–11, released 88 FCC 2d 1033. February 4, 1981, *review denied*, FCC 82–128, released April 16, 1982.

[18] *See* Sections 1.315(a), (b), 1.316(a), (b), (c), (d), (f).

cient authority to limit discovery in appropriate cases. *See, e.g.*, Section 1.313(e). This includes affirmatively requiring the parties to elect either interrogatories or depositions, but not both.[19] In addition, the present rules provide for protective orders to prevent abuses. Section 1.313. Thus, if a party attempts both depositions and interrogatories, the other party can file a motion for a protective order. If the motion has merit, the party can expect that it will be granted. The flexibility in the existing rules is, in our view, clearly preferable, especially when it is considered that depositions and interrogatories are complementary means of discovery and may be desirable in combination in any given case, including apparently "routine comparative cases."

22. Finally, it is suggested that we authorize the judges to limit the number of interrogatories and depositions to prevent unnecessary, excessive or onerous burdens on parties or witnesses. While there is some merit to this proposal, we have decided not to adopt it. Under our present rules, if a party files an unduly burdensome number of interrogatories, the judge has the authority to issue a protective order to curb the abuse. *Cf. J.B. Broadcasting of Baltimore, Ltd.*, 70 FCC 217 (1979).

Conclusion

23. In conclusion, the Report has been helpful to us in our assessment of the discovery rules. The Report demonstrates that our discovery rules in general are adequate and have worked well in the past. The rules, which are widely used, have met our initial expectations and goals of facilitating preparation for the hearing, promoting fairness, and expediting and improving the decision-making process. *See Report and Order on Discovery Procedures, supra.* No widespread or profound failings are disclosed in the scope, availability or implementation of the discovery procedures. Moreover, discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer hearing. Therefore, we have decided to retain the existing rules and to make only minor changes. This does not mean that we are unwilling to revise our rules when necessary. It simply means that we are basically satisfied with the operation of the existing discovery rules. It goes without saying that we expect the judges to vigorously exercise their authority to control and regulate Commission hearings. Section 1.243(f). *See Equal Employment Opportunity Commission, supra; Selma Television, Inc.*, 3 FCC 2d 63

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[19] For example, in the Destin, Florida FM broadcast proceeding (BC Docket Nos. 80–273–274), the presiding judge, in his order prior to the pre-hearing conference, said that the parties could use either written interrogatories *or* take depositions upon oral examination. However, he specifically forbade the use of both interrogatories *and* depositions in the absence of a persuasive showing that it was essential. *White Sands Broadcasting, Inc.*, FCC 80M–1026, released June 19, 1980. This is an example of the flexibility and discretion accorded to the judges under the existing rules. That flexibility is desirable and will be continued.

(1965). We also encourage the parties to cooperate in the discovery process. It is expected that all the parties to our hearings will respect and adhere to our rules and not abuse them.

24. A statement we made in a different context several years ago is relevant here:

> It is commendable for [an administrative law judge] to exercise firm control of the course and conduct of a proceeding and to adopt such innovations in procedure as are consistent with the statutes, the Rules of the Commission, the rights of the parties, and adapted to achieve expedition of proceedings, the full disclosure of facts and the attainment of justice. *Tinker, Inc., supra*, 4 FCC 2d at 374.

25. Authority for the amendments set out in the attached Appendix is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r). Because the amendments are procedural in nature, the prior notice and effective date provisions of 5 U.S.C. 553 do not apply.[20] The amendments will be effective thirty days from the release date of this order.

ACCORDINGLY, IT IS ORDERED, that effective December 10, 1982, Sections 1.311(c), 1.318(c), and 1.333(b) of the Commission's Rules are amended, as set forth in the attached Appendix.[21]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricrico *Secretary*

Appendix

Amendments to Part 1 of the Commission's Rules and Regulations—The Rules of Practice and Procedure Affecting the Discovery Process

Section 1.311 General.

* * *

(c) *Schedule for use of the procedures.* (1) Except as provided by special order of the presiding officer, discovery may be initiated before or after the prehearing conference provided for in § 1.248(a)(1). The presiding officer may at any time order the parties or their attorneys to appear at a conference to consider the proper use of these procedures or the time to be allowed for such use.

Section 1.318 The taking of depositions.

* * *

(c) *Oath; transcript.* The officer before whom the deposition is to be taken shall administer an oath or affirmation to the witness and shall personally, or by

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[20] Section 1.412(b)(5) of the Rules provides that, "Rule changes(including adoption, amendment, or repeal of a rule or rules) relating to [Commission procedures or practice] will ordinarily be adopted without prior notice . . . ." In this case, we are making only minor changes in procedural rules with the assistance of a carefully written report prepared after much deliberation and study. Therefore, there is no need to institute a rulemaking proceeding before acting on the Report's various recommendations.

[21] In cases already designated for hearing prior to the date the rules are effective, the presiding judge should allow or disallow the use of the various amended procedures in the interest of fairness and orderly procedure.

someone acting under his direction and in his presence, record the testimony of the witness. The testimony may be taken stenographically or, upon approval by the presiding officer, testimony may be taken through the use of telephonically or electronically recorded methods, including videotape. In the event these latter methods are used for the deposition, the parties may agree to the waiver of the provisions of subsections (e) and (f) as appropriate and as approved by the presiding officer.

Section 1.333 Requests for issuance of subpoena.

* * *

(b) Requests for a subpena *duces tecum* shall be submitted in writing, duly subscribed and verified, and shall specify with particularity the books, papers, and documents desired and the facts expected to be proved thereby. Where the subpena *duces tecum* request is directed to a non-party to the proceeding, the presiding officer may issue the same, upon request, without an accompanying subpena to enforce a notice to take depositions, provided for in subsection (e) of this section, where it appears that the testimony of said person is not required in connection with the subpena *duces tecum*.

Radio Control
Remote Control Operation
Security Alarm Signalling

Part 15 amended concerning radio control and security alarm devices. Order expanded cautionary section in the rules warning manufacturers to choose frequencies and design their products in order to minimize susceptibility to all high power radio services. Also, it relaxed the allowable rate of self-testing or polling of radio control transmitters in wireless security systems.
—*Amendment of Part 15*
Docket No. 20990

FCC 82–467

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In the Matter of	
Amendment of Part 15 of FCC Rules to provide for remote control and security devices.	Docket No. 20990 RM–1617 RM–2152 RM–2223

MEMORANDUM, OPINION, AND ORDER

Adopted: October 28, 1982; Released: November 2, 1982

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT; COMMISSIONER DAWSON DISSENTING; COMMISSIONER RIVERA ABSENT.

1. On October 22, 1981, the Commission adopted a *Report and Order* (hereafter *Report*) in the above captioned proceeding. This *Report* amended the Commission's Rules to allow greater flexibility in the operation of non-licensed low power transmitters for radio control and wireless security alarm purposes. The Federal Register published this *Report* on November 10, 1981 at 46 FR 55520.

2. The American Radio Relay League (ARRL), A.R.F. Products, Inc. (ARF), and Pittway Corporation (Pittway) filed timely petitions for

reconsideration.[1] ARRL also petitioned for a stay of the rules. Oppositions were submitted by Central Station Electrical Protection Association (CSEPA), Mura Corporation (Mura), and ARF. Replies to the oppositions were received from ARRL.

Background

3. In addition to remote operation of garage doors, short range radio control equipment is useful and cost-effective for other applications. As a prime example, wireless security alarm systems, utilizing radio control to remotely operate an alarm, are now a viable alternative to and can be less costly than their traditional wired counterparts. Since advancing electronic technology has reduced the size and cost and increased the capability of RF transmitters and receivers, the attractiveness of radio control has grown in security and other applications. Furthermore, wiring is sometimes impractical in control applications and otherwise may increase costs as evidenced by the more expensive installation of wired security systems.

4. Because of the low power needed (short range) and marketing directed toward the general public, manufacturers have generally pursued authorization for operation of radio control devices under the exemption from licensing pursuant to Part 15. However, in the frequency range usually desired for this equipment[2], Part 15 Rules restricted the usefulness of transmitters in various radio control applications. Specifically, for transmitters operating above 70 MHz, § 15.120 set out an emission limitation and a duty cycle restriction which calls for a one second limitation on the transmission duration with a mandatory silent period of 30 seconds between transmissions. This duty cycle restriction on transmission was designed to reduce interference potential and at the same time prohibit the use of these devices for voice transmission. Although radio control operation satisfied the intent of § 15.120, the duty cycle restriction reduced reliability and versatility in many radio control applications. Specific regulations for radio control devices without a mandatory duty cycle existed only for garage door controls.[3] Garage door control devices could operate at approximately twice the level allowed under § 15.120 on fre-

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[1] *Petition for Reconsideration and Stay of Effective Date* submitted by ARRL on December 2, 1981 (46 FR 61722; December 18, 1981). *Petition for Reconsideration* submitted by Pittway on December 9, 1981 (46 FR 62693; December 28, 1981). *Petition for Clarification and Reconsideration of Final Order* submitted by ARF on December 10, 1981 (46 FR 62693; December 28, 1981).

[2] The frequency range from 225 to 400 MHz allocated to the federal government has been the most heavily used for non-licensed low power radio control equipment because of good signalling characteristics, small physical size and low cost of electronic components, and the relatively quiet nature of this portion of the spectrum in metropolitan areas.

[3] Rules for garage door openers were adopted in the *Second Report and Order* of FCC Docket No. 15657 (36 FR 6504, April 6, 1971), subsequently revised in a *Memorandum Opinion and Order* (36 FR 12905, July 9, 1971).

quencies above 70 MHz with the exception of certain aeronautical frequencies.

5. In 1976, several parties in the wireless security alarm field petitioned for revision of Part 15 to allow more flexibility and reliability for radio control operation in alarm systems.[4] Basically, they requested relaxation of the duty cycle restriction and operation at the relatively higher level of emission afforded to garage door radio controls.

6. In response to these petitions, the Commission adopted a Notice of Proposed Rule Making proposing to delete the duty cycle restriction and the current rules for garage door opener devices and to consolidate the rules in Part 15 for low power transmitters used in radio control applications.[5] It was proposed to limit operation to specific bands as opposed to allowing operation on any frequency above 70 MHz because of the expected new uses and proliferation of radio control devices. In addition, the proposal prohibited continuous transmission.

7. Many objections were filed to the Commission's proposal. The major objections were concerned with the relatively low permitted levels of radiation, restriction on bandwidth and available frequencies, and the lack of a provision for periodic transmission. Since this proceeding proposed to authorize use of government frequencies, further coordination with government users of the frequency spectrum became necessary to resolve these objections.

8. The Office of Telecommunications Policy (OTP), now the National Telecommunications and Information Administration (NTIA), submitted a report which essentially stated that certain government frequencies could be used for control and security devices under the standards for garage door openers then in effect.[6] The report stipulated that periodic transmissions at regular predetermined intervals should be subject to lower levels of radiated emission set out in § 15.120. NTIA officially informed the Commission in May of 1981 that it still supported the recommendations in the 1977 report.

9. In response to the growing demand for low-cost wireless security alarm systems, and in view of the comments by NTIA and others in the record, and the relatively few complaints of interference from certificated garage door opener systems, the final rules adopted by the Commission's *Report* (paragraph 1 above) relaxed the proposal. The *Report* basically expanded the scope of the garage door opener rules to cover security alarm and other radio control devices. The Commission permitted these

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[4] RM–1617 filed by Property Protection Service of America. RM–2152 filed by the Security Equipment Industry Association (SEIA); RM–2223 filed by Stanley Works.

[5] Notice of Proposed Rule Making in Docket 20990 adopted November 10, 1976 (41 FR 52705; 61 FCC 2d 10, Page 1174).

[6] U.S. Department of Commerce/Office of Telecommunications, OT Technical Memorandum 77–244, "An Analysis of Remote Control and Security Devices in the 225–400 MHz Band", November 1977.

devices to operate generally above 70 MHz (except in certain sensitive frequency bands) at levels previously reserved only for garage door control transmitters. As proposed, additional limitations were put on bandwidth and emissions of a spurious or harmonic nature and a new band 40.66 to 40.7 MHz was provided.

10. A provision (§ 15.122) similar to § 15.120 was retained in Part 15 for general purpose transmitters that operate at periodic pre-determined intervals such as transmitters employed in energy management systems. Because of their higher interference potential and NTIA's comments, the semi-continuous, duty-cycled emissions from these transmitters were restricted to reduced emission levels. The Commission made an exception to this reduction in emission in the case of periodic supervisory transmissions in a wireless security system if those transmissions were limited to a periodic rate of one transmission every eight hours.

ARRL Petition for Reconsideration

11. ARRL petitioned to exclude three VHF/UHF bands (144–148, 220–225, and 420–450 MHz), allocated to the Amateur Radio Service, from use by radio control and security alarm devices. ARRL requests that these bands be listed in the excluded bands in paragraph (a) of § 15.205. Pursuant to this regulation, emissions from a control or security alarm transmitter or receiver shall not fall within certain sensitive frequency bands such as those utilized by the aeronautical services. An emission level below 15 uV/m at 3 meters is considered to comply with this requirement for frequencies below 1000 MHz.

12. ARRL is greatly concerned about susceptibility of security alarm systems to amateur radio signals. ARRL states that amateur stations operate at high power levels and are usually located in residential areas in close proximity to homes where burglar alarm and other security systems may be installed. ARRL contends that the potential for an amateur station to jam a security system or trigger a false alarm is very high if control devices are allowed to operate in the amateur radio bands. Because of the close proximity of operation, ARRL is additionally concerned about the potential of radio control and security devices to cause interference to licensed amateur stations. Because of these concerns, ARRL requests a stay of the rules for these devices while the Commission considers the merits of its petition for reconsideration. ARRL also requests that the Commission reopen this proceeding with the issuance of a further notice of proposed rulemaking.

Oppositions to ARRL Petition

13. CSEPA, Mura, and ARF oppose ARRL's petition for reconsideration and stay. They state that manufacturers of security alarm equipment are aware that operation under Part 15 is on a sufferance basis and will

design their equipment accordingly. They contend further that it is in the manufacturers' interest to guard against susceptibility and interference because a security system, which produces false alarms or can not operate in the presence of interfering signals or which causes interference itself, reduces the marketability of the product. Accordingly, they argue that manufacturers should have the responsibility of choosing an operating frequency and designing the device to minimize susceptibility and interference. In this respect, they assert that signal coding of security alarm transmissions has proven to be an extremely valuable design asset in reducing susceptibility.

14. Furthermore, they contend that placement of amateur radio frequencies in the excluded bands of § 15.120(a), as requested by ARRL, is overly restrictive. Moreover, they maintain that imposing the emission limit in § 15.205(a) of 15 uV/m at 3 meters in the amateur bands goes far beyond ARRL's basic objective to protect amateur stations from interference and prohibit operation on amateur frequencies. Mura points out that past provisions in Part 15, particularly § 15.120, have allowed emissions in the amateur bands at levels much higher than the limit now sought by ARRL (15 uV/m at 3m).

15. Mura adds that it has already designed security equipment to operate under the new rules. According to Mura, this equipment does not operate on the amateur frequencies, but low level radiation, that is below the spurious and harmonic emission limit in § 15.205(b), is present in the amateur bands. Mura notes that emissions could not be reduced below the low limit in § 15.205(a) without delaying availability of the device to the public. Further, Mura states that manufacturers would have to expend considerable costs in maintaining 15 uV/m at 3 meters in the amateur bands.

16. The parties opposing ARRL state that there have been no cases of interference and no action should be taken by the Commission until there is a demonstrated need arising through experience. Mura asserts that, if it was found necessary through data and experience to further restrict emission levels in the amateur bands, the spurious and harmonic emission limit of 20 dB below the maximum fundamental level would be adequate and would not seriously affect equipment design.

17. In response to the stay request by ARRL, the opposing parties maintain that a stay of the rules is not in the public interest because the public should not be delayed access to a low cost means of protecting life and property made possible by wireless alarm systems. Since no documented cases of interference were shown, they state that no significant injury exists to ARRL's interests. Finally, according to those opposing, ARRL did not consider the harm to the public through loss of property and lives without affordable alarm systems and should have analyzed the effects of a stay on manufacturers and consumers.

ARRL Response to Oppositions

18. In replying to these oppositions, ARRL concedes that amateur frequencies are not currently being used by radio control and security alarm devices. However, the major consideration, according to ARRL, is that the amateur bands should not be made available by the rules for this equipment. ARRL believes that future interference problems should be anticipated and avoided by not permitting use of the amateur bands. ARRL states that this interference possibility should not be handled after it occurs because the amateur and consumer would not be able to resolve the problem after the fact.

19. ARRL maintains that, since there is no reason why amateur frequencies should be utilized and with the potential for unique interference problems, the public interest lies in prohibiting wireless security alarm systems to use amateur frequencies. ARRL states that the primary concern of the FCC should be the needs of consumers for alarm systems which are not subject to false alarms and also not capable of causing interference. In view of these reasons and recognizing the public's need for low cost security systems, ARRL reduced the extent of its request for stay to a partial stay that would only prohibit the manufacture and sale of radio control and security alarm devices designed to operate on the amateur frequencies of interest.

Commission Discussion Regarding ARRL Petition

20. In response to ARRL, the Commission has never specifically excluded the amateur radio bands from use by low power communication devices operating in accordance with Part 15 regulations. General purpose semi-continuous transmitters subject to § 15.120, which have been used in various applications such as control and security, and garage door opener transmitters have been allowed to operate generally above 70 MHz with the exception of certain sensitive frequency bands.

21. Although the amateur bands above 70 MHz were not expressly prohibited from use, manufacturers have not designed their equipment to operate on the amateur frequencies or other frequencies which are not "quiet" in metropolitan and residential areas. Due to the relatively high signal levels of amateur radio transmissions and the fact that most amateur operation occurs in cities, manufacturers have steered away from frequencies allocated to the Amateur Radio Service. As evidenced by the relatively few complaints of interference from certificated low power transmitters to amateur operation, this policy has worked well and manufacturers have used good judgment in selecting frequencies for their equipment where the potential for interference is low.

22. In view of the above and the comments by NTIA and others, the Commission utilized the same approach in the newly adopted rules for

control and security alarm devices by allowing operation generally above 70 MHz. As was done with garage door openers, the Commission placed a very tight restriction on emissions from both the receiver and transmitter in certain government bands used for critical communications and aeronautical radio purposes. This, of course, effectively negates any operation by a control or security alarm device in those sensitive frequency bands.

23. In view of the foregoing, we do not believe that ARRL's proposal to exclude the three VHF/UHF amateur bands is the best approach to take. Since § 15.205(a) is intended to protect public safety, aeronautical communications and other critical operations, restriction on emissions in these bands is extremely tight. The Commission agrees with the view expressed in the oppositions that the limit of 15 uV/m at 3 meters in the excluded bands is beyond what is necessary to protect radio amateurs and may unnecessarily increase equipment cost.

24. ARRL has a legitimate concern that an amateur station may cause a wireless security system to operate improperly or false alarm. However, this concern about susceptibility can not be resolved by simply prohibiting the use of amateur radio frequencies. The device's operating frequency is only one consideration involved in minimizing susceptibility. Operating on a frequency outside the amateur band does not, in and of itself, guarantee the immunity or non-susceptibility of a security alarm receiver to amateur radio signals. Susceptibility is also dependent on other considerations such as receiver selectivity, signal coding, etc.

25. In the *Report* in this docket, the Commission expressed its concern about the susceptibility to interference of radio devices used for security or medical purposes.[7] The adopted rules included § 15.204 to caution manufacturers to consider susceptibility when designing their products and avoid operation on frequencies used by high power government and non-government stations. Soon after the *Report* was adopted, Congress adopted a public law[8] which amended Section 302 of the Communications Act to give the Commission authority to establish minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy. In the Conference Report[9] which accompanied the legislation, Congress indicated that this provision is intended to include home burglar alarm and security systems and medical alert devices. The Conference Report also makes it clear that the Commission has a number of alternatives in exercising this authority and that industry adopted voluntary standards are preferable.

26. We would like to reemphasize our concern about susceptibility. At this time we will continue to follow the course set out in the *Report* to

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[7] See paragraphs 29 and 37 of the *Report*.

[8] Public Law No. 97–259 effective September 13, 1982.

[9] Communications Amendments Act of 1982, *Conference Report*, dated August 19, 1982.

encourage manufacturers to take whatever measures are necessary on an individual and voluntary basis. We believe that sufficient incentive exists to do so because the marketability of a security or medical emergency device would seemingly depend on its reliability. Nevertheless, we strongly encourage manufacturers to carefully study this matter through their respective trade associations or standards bodies to which they belong and adopt voluntary susceptibility standards if found to be appropriate. The Commission is hopeful that manufacturers will act in good faith in this area and that reports of security or medical alert equipment malfunction due to radio interference will be few in number. In this regard, we plan to closely monitor the susceptibility performance of wireless security and other radio control systems.

27. In the past, manufacturers have shown a willingness to design equipment with susceptibility in mind. As discussed previously, manufacturers have a good record in choosing frequencies for operation away from frequencies where high power operation occurs around residential areas. Because of the many options that have been available for an operating frequency, there was no pressing need for manufacturers to use frequencies allocated to high power services. The new rules continue to provide many options for a clear operating frequency. In addition, manufacturers of security systems have also utilized signal coding to further reduce susceptibility.

28. However, because of the unique susceptibility and interference problems which may arise between security alarm systems and amateur operation, the Commission is expanding § 15.204 to caution manufacturers further about amateur radio and other licensed high power operations so that manufacturers can take appropriate steps in designing for minimum susceptibility and interference. In addition to the Amateur Radio Service, there are other licensed services such as broadcasting which because of high power, close proximity, or high susceptibility to interference should also be considered in the design of radio control and security devices. Accordingly, the new paragraph (c) of § 15.204 will not be limited to a warning about amateur radio operation but will encourage manufacturers to be aware of all licensed services which should be considered in the design of their equipment.

29. In view of the above and judging from past experience with this equipment, it was not expected that any control or security alarm device would be designed to operate under the newly adopted rules in the amateur bands. Accordingly, a need was not evident to stay the rules during the pendency of reconsideration in this proceeding. In fact, the Commission has not received any applications for certification of control or security alarm equipment that would operate under the new rules in the amateur bands of concern.

30. ARRL also alleges that the Commisson did not follow the Administrative Procedure Act (APA) (5 USC 553) in this proceeding and requests that the Commission issue a second notice of proposed rulemaking. ARRL states that the final rules adopted depart significantly from those proposed in 1976 without an opportunity for further public comment to bring the record up to date. According to ARRL, if recent comments had been solicited, the Commission would have discovered the loading and increased activity in the VHF/UHF amateur radio bands which increases the interference problems of operating security alarm devices on the same frequencies.

31. All the requirements of the APA were followed during this proceeding. In the NPRM, we specified the areas where changes were contemplated in the rules. In its comments to the proposal, ARRL brought to the Commission's attention its concern about possible co-channel interference between amateur radio stations and security devices. The Commission considered ARRL's comments, which have not changed in substance, when it adopted rules by *Report and Order* in this docket. It also took into account the very low incidence of interference under Part 15 requirements then in effect for this kind of equipment. The technology used by the devices in question and other technical factors relevant to the use of the spectrum by security devices did not appreciably change during the course of this proceeding. Due to the many technical objections to the proposal which had to be resolved and the further coordination necessary with NTIA[10], additional time was needed to complete this proceeding. After resolving the technical issues and receiving concurrence from NTIA and IRAC, we adopted final rules which combined elements of the proposal with then existing Part 15 requirements.

ARF and Pittway Petitions for Reconsideration

32. In general, ARF and Pittway, which are manufacturers of security systems, support the Commission's *Report* but state that the wireless security industry needs a provision for polling[11] or testing at a greater rate than provided by the Commission in the adopted rules. ARF also requests that the Commission clarify whether polling transmissions by a transmitter in a wireless security system can be governed by § 15.122 (semi-continuous transmitters) in addition to the provision for polling in § 15.201(a)(3) of the rules for control and security alarm devices.

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[10] Since control and security alarm equipment under Part 15 may operate in the government bands, concurrence is necessary from NTIA and the Interdepartment Radio Advisory Committee (IRAC), which is composed of representatives from various government users of the frequency spectrum such as the Federal Aviation Administration (FAA), Department of Defense (DOD), etc.

[11] Polling as used herein refers to periodic transmissions by radio control transmitters employed in a wireless security system to check periodically whether a fault condition exists in a transmitter or its RF transmission path in order to maintain the integrity of the security system.

33. ARF and Pittway allege that the limitation on the polling rate of 1 transmission every 8 hours in § 15.201(a)(3) is unnecessarily restrictive, arbitrary, and contrary to the public interest. They contend that reliability of security systems would be degraded with such a polling rate. According to ARF and Pittway, checking for a fault condition three times a day is not sufficient to insure effective supervision of security system performance. For example, Pittway cites, as a possible occurrence, that a security system may have been unable to function all night without the homeowner's knowledge. This undetected system failure for a period up to 8 hours, according to Pittway and ARF, can have very serious consequences jeopardizing life and property.

34. ARF recommends that the Commission allow a maximum periodic rate of one transmission per minute for polling. Further, ARF's proposal would limit total time of transmission to 5 seconds accumulated over an 8 hour period. Effectively, this would limit time of transmission for polling to approximately 10 milliseconds at a periodic rate of one transmission per minute.

35. Since § 15.122 applies to periodic transmissions for any application, ARF requests clarification as to whether security alarm equipment can simultaneously operate under § 15.122 and under the provisions for control and security alarm devices in Sections 15.201 et seq. Although § 15.122 allows a very high periodic rate of transmission which would accommodate ARF's requested rate, ARF asserts that polling at lower emission levels in accordance with § 15.122 is not effective.

36. ARF suggests that the polling rate provided by the Commission only allows one sensor transmitter in a wireless security system to transmit in an 8 hour period. Since these systems are usually composed of many transmitters (from 10 to 30), ARF states that days may go by before notification of a problem with a certain transmitter. In respect to this point, Pittway requests the Commission to clarify if the polling provision in § 15.201(a)(3) applies to each device or to an entire system.[12]

37. In its petition, Pittway stated that it prefers supervisory signals several times per hour but is aware of the Commission's concern about interference potential. Accordingly, Pittway petitioned for a polling rate of one transmission not exceeding 5 seconds every hour. Pittway maintained that continuous supervision is desirable for wired systems but is not practical or necessary for wireless systems. Additionally, Pittway believed that its proposed rate of supervision would provide an acceptable level of reliability and result in only a negligible increase in interference potential. In commenting on Pittway's petition, ARF supports the request for more frequent supervision signals but objects to a limitation of one signal per hour. ARF alleges that supervision once per hour may

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[12] *Petition for Declaratory Ruling of Pittway Corporation* filed March 1, 1982.

leave the premises unprotected for a full hour in the event of a malfunction or deliberate disabling.

38. Pittway later resolved the conflict on polling rate between its petition and that of ARF. Pittway has indicated in the record that it now totally supports the polling rate proposed by ARF of up to one transmission per minute, for a total transmission time of less than 5 seconds duration in any 8 hour period.

39. ARF maintains that its recommended rate for polling would not cause harmful interference. With its filings, ARF submitted measurements on security alarm transmitters showing that the field strength decreases with the square of the distance—much faster than the normal inverse distance field strength relationship. ARF contends that government users of the spectrum would not be subject to interference as a result of more frequent operation at the higher levels in § 15.205(b) alleging that at this emission level the signal is virtually unmeasurable at 500 to 600 ft. from the transmitter. According to ARF, since government operation seldom occurs within this distance of a home, interference potential is very small. It is also pointed out that the very brief interval of transmission further minimizes the threat of interference.

40. ARF also contends that wireless alarm systems polled at a rate of one transmission per 8 hours can not be competitive with continuously supervised wired systems. ARF states that wireless security systems need to be reliable in order to be marketable and polling at the rate adopted would not achieve acceptable reliability. Further, it is stated that many companies which provide security equipment agree that a polling rate of one transmission every 8 hours would preclude wireless security systems from achieving any substantial share of the market for security systems.[13]

Commission Discussion Concerning Polling

41. The Commission is aware of the importance of the self-check or polling feature in wireless security systems to maintain adequate reliability. However, unlike supervision in wired systems, continuous supervision in wireless systems is paid with a price of increased interference potential and RF noise level. NTIA recommended that the Commission compensate for this increased interference potential by subjecting such emissions of a periodic semi-continuous nature to lower emission limits. This policy was implemented in the adopted rules by promulgating § 15.122 that is basically equivalent to the current § 15.120. Section 15.122 provides for semi-continuous periodic emissions at approximately one

[13] ARF attached a letter to its petition from Wallace Trauscht, Vice President, Operations of Certified Security Systems, Inc. to the Commission giving his opinion that wireless systems would not be feasible in a significant share of the market without more frequent supervision.

half the emission level allowed under § 15.205(b) for radio control and security alarm devices.

42. Notwithstanding § 15.122, the Commission in the *Report* made an exception for polling in wireless security systems and allowed security alarm transmitters to emit periodic transmissions for polling or supervision purposes at the levels provided by § 15.205(b). However, in sharing NTIA's concern about the interference potential of periodic transmissions, the Commission adopted the minimum rate found acceptable for polling in the comments. A rate of one transmission not exceeding 5 seconds every 8 hours was adopted as recommended by the Security Equipment Industry Association (SEIA). In respect to Pittway's request for clarification, the Commission's intent in the adopted provision for polling, and Part 15 rules in general, apply to each device. Accordingly, the allowable rate of polling that the Commission provided is on a per transmitter basis and this will be clarified in the rules.

43. A rate of polling of one transmission per 8 hours, according to SEIA in its comments to the proposal, was determined to be satisfactory at a meeting sponsored by it and composed of security alarm manufacturers. ARF responds in its petition by stating that it is not a member of SEIA and was not aware of the meeting or proposal. Pittway asserts that the SEIA proposal was made as a compromise to have some standard in the rules but is so conservative that it defeats the purpose of supervision.

44. Due to the lack of reliability studies or analyses on wireless security systems with various polling rates, it is a highly subjective matter at this point in deciding on a proper rate of polling. Pittway and ARF did not provide the Commission with any reliability analyses or studies to support their arguments. There was even a difference in the petitioners' original requests for a higher polling rate. Also, in the letter from a security system user appended to ARF's petition, a higher rate of polling was requested but no specific rate was recommended.[14] Although Underwriter's Laboratory (UL) has written standards for security alarm equipment, a UL standard on polling in wireless alarm systems does not exist. The Commission has been notified that UL is in the process of developing performance standards for wireless alarm systems, but time will be needed to formulate and approve such standards.

45. The Commission does not necessarily dispute the contention that checking three times a day for a fault condition or problem with a transmitter in security systems may be inadequate. However, the Commission is not willing to allow one transmission every minute for each transmitter in a security system at the emission levels provided for control and security transmitters for the following reasons. Notwithstanding the many other factors involved in interference potential (trans-

[14] See footnote 13, supra.

mission duration, response time of the susceptible receiver, rate of emission decay, etc.), transmitters operated more often are more likely to cause interference. Security systems are composed of many (10 to 30) transmitters further contributing to interference concerns. Increased interference potential is not easily tolerated because the devices in question have general use of the frequency spectrum above 70 MHz. Finally, in view of the above (paragraph 44), the Commission has not been adequately convinced that the requested rate of polling is actually needed for a reliable security system.

46. As a reasonable compromise, the Commission considers a polling rate of one transmission of one second duration per hour to be suitable for supervising an alarm system and is hereby amending the rules accordingly. In the Commission's view, such a rate would only minutely increase interference potential as compared to the five second transmission every eight hours previously allowed and be adequate in accomplishing the objectives of polling. The transmission duration of one second should be sufficient to contain the necessary coded information for polling purposes. As was the Commission's intent in the *Report*, security systems utilizing higher polling rates may accomplish polling at reduced emission levels pursuant to § 15.122 to compensate for the higher interference potential.

47. It must be noted that a security system is designed to operate whenever there is an emergency and that the polling feature is only important for warning the user if a breakdown occurs in the system. The Commission believes that the probability that a burglary or other emergency occuring simultaneously after a malfunction in the security system and within the hour maximum time of notification is extremely small especially when considering the increasing reliability of electronic components. In the event of intentional (by a burglar for example) or accidental tampering of a transmitter, the rules do not prevent transmissions triggered by utilizing a tamper-proof case or other means of detecting tampering. Moreover, the rules provide for automatic activation of a transmitter at any time, as for example, with detection of a low battery condition or other anomaly existing in the transmitter. If a manufacturer insists on using a greater rate for polling (i.e. at the rate requested by ARF and Pittway), he must maintain a lower emission level in accordance with § 15.122 which provides for high, semi-continuous periodic rates of transmission. This is clarified in the rules as requested by ARF.

Miscellaneous Issues

48. The Commission takes this opportunity to correct several errors and resolve certain conflicts in the rules and measurement procedure for radio control and security alarm devices. When the new rules were adopted, the Commission specified an emission limit in the excluded bands in § 15.205(a) of 15 uV/m at 3 meters below 1000 MHz. However,

pursuant to § 15.142 (Range of Measurements) referenced by § 15.215 in these rules, emission measurements must usually be taken beyond 1000 MHz—the extent to which depends upon the fundamental operating frequency. Hence, it is necessary to specify a limit above 1000 MHz. A limit approximately 40 dB below (by a factor of 100 in voltage) the maximum fundamental level above 1000 MHz would be technically achievable and measureable with currently available technology and would also serve to protect government communications without unnecessarily increasing equipment cost. Accordingly, the Commission is hereby amending § 15.205(a) to restrict emissions to 125 uV/m at 3 meters or equivalent power density in the excluded bands above 1000 MHz.

49. Correspondingly, the measurement procedure is also corrected by denoting that radiated emission be scanned in accordance with § 15.142. Also, Figure 1 in the measurement procedure will be modified to indicate an ellipse as the recommended contour for an open field site. This configuration has been shown to be more practical. The Commission has recently adopted an Order[15] which sets out a new FCC Bulletin OST 55 to give guidance to industry in establishing open field test sites. We will refer to this bulletin in the measurement procedure. In addition, we will expand paragraph 4.2.2. of the measurement procedure to give further guidance to industry in respect to instrumentation bandwidth and in measuring broadband emissions with signal energy outside the specified bandwidth. Appendix B sets out the changes to be made to the measurement procedure for control and security alarm devices appended to the *Report*. This procedure is to be published as FCC Measurement Procedure MP–1 (1981) and will be available through the FCC duplicating contractor.

50. Since emission limits are specified in average values and some control transmitters are operated in a pulsed mode, many manufacturers have inquired about the time interval over which the signal is averaged to determine field strength. For low power transmitters which operate in a pulsed mode under Part 15, we have required that measured field strength be determined from the averaged absolute voltage during a 0.1 second interval when field strength is at its maximum value.[16] This is basically equivalent to selecting a detector integrating-time-constant of 0.1 second in accordance with the American National Standard specifications (C63.2–1980) for electromagnetic noise and field stength instrumentation, 10 kHz to 1 GHz. A note will be added below the table of field strength limits in §§ 15.122 and 15.205 to specify the averaging interval of 0.1 second.

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[15] Docket No. 21371: In the Matter of amendment of Part 2 to require a description of measurement facilities used in the equipment authorization program and make other changes. *Order Terminating Proceeding* adopted August 3, 1982 and released August 6, 1982 (FCC 82–359).

[16] See the Note in Section 15.309 of Part 15 Subpart F—Field Disturbance Sensors.

51. Many questions have arisen concerning the provision for continuous operation of transmitters in the alarm condition pursuant to § 15.201(b). This provision appears to need further clarification. The Commission's intent was to allow a transmitter used in security applications to operate continuously during an emergency in order to improve the reliability of receiving emergency transmissions. The interference potential resulting from this operation is considered negligible because emergencies such as fire, burglary, safety, etc. are expected to be rare occurances and because continuous emissions during these emergencies will probably be periodic in order to conserve battery power. Manufacturers are cautioned to use the minimum transmission necessary to insure reception of the alarm signal during an emergency. Section 15.201(b) will be clarified as set out in Appendix B.

52. After an administrative revision to Part 15 in 1975,[17] the limits for garage door opener devices in § 15.184 were inadvertently transposed for the two bands 70 to 130 MHz and 130 to 174 MHz in the revised printing of Part 15. This error was unknowingly carried over into the recently amended rules for radio control and security alarm devices. The limits for these two bands are hereby transposed to read correctly as shown in Appendix A. In addition to the above, we are making a few minor administrative changes to the rules as set out in Appendix A.

53. In view of the previous discussions, the Commission does not agree with the procedural arguments of ARRL and believes that the issuance of a stay and further notice of proposed rulemaking is unnecessary and contrary to the public interest. Accordingly, ARRL's request for a stay and a new rulemaking IS HEREBY DENIED.

54. Pursuant to the authority contained in Sections 4(i), 302 and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED that, effective December 9, 1982, Part 15 is amended as set out in Appendix A, attached. IT IS FURTHER ORDERED that the measurement procedure MP–1 is revised as shown in Appendix B and that this proceeding is TERMINATED.

55. For further information about this MO&O, contact Mr. Sydney P. Bradfield, Office of Science and Technology, Federal Communications Commission, Washington, D. C. 20554, telephone (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[17] In the Matter of: Revision of Part 15 to conform it to Subpart J of Part 2 and to reorganize the rules therein. Order adoted November 12, 1974 and released March 7, 1975 (FCC 74–1221), 51 FCC 2d 459.

Appendix A

1. Section 15.122 is amended by adding a note below the table in paragraph (a) to read as follows:

Section 15.122 *Periodic operation in the bands 40.66–40.70 MHz and above 70 MHz.*

* * * * *

(a) * * *

NOTE: For pulsed operation, measured field strength shall be determined from the averaged absolute voltage during a 0.1 second interval when field strength is at its maximum value.

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2. Section 15.184 is amended by revising the table of paragraph (c) to read as follows:

Section 15.184 *Interim requirements for operation above 70 MHz.*

* * * * *

(c) * * *

Frequency (MHz)	*Field strength at 30 meters (uV/m)*
70 to 130	125.
130 to 174	125 to 375 (linear interpolation).
174 to 260	375.
260 to 470	375 to 1250 (linear interpolation).
Above 470	1250.

* * * * *

3. Section 15.201 is revised to read as follows:

Section 15.201 *Scope*

A device that uses radio frequency energy for control or security alarm applications excluding radio control of toys may be operated without an individual license under these provisions. Examples of such devices include, but are not limited to, radio control of a fire, burglar, security, or other emergency alarm; control of a door opener, control of a remote switch, etc. Radio controlled toys and games are not allowed to operate under these provisions.

(a) Devices operating under these provisions may not be used for continuous transmission. The following transmissions are not permitted:

(1) voice communications.

(2) data communications regardless of modulation. This prohibition is not intended to prohibit digital coding of transmissions for radio control or security alarm purposes.

(3) periodic transmissions at regular predetermined intervals except in accordance with paragraph (b) of this Section.

(b) Polling or supervision transmissions to determine security system integrity are allowed at the maximum emission limit in § 15.205(b) if the periodic rate of transmission does not exceed one transmission of not more than one second duration per hour for each transmitter. The transmitter may also be polled at the rate specified in § 15.122, provided it complies with the

reduced field strength levels and other specifications in § 15.122 when operating at the higher polling rate. This provision only applies to transmitters used in security or safety applications.

(c) A transmitter operated manually must employ a switch that will automatically deactivate the transmitter when released.

(d) A transmitter activated automatically must cease transmission within 5 seconds after activation.

(e) Notwithstanding paragraphs (c) and (d), a transmitter employed for radio control purposes during emergencies involving fire, security, and safety of life may, when activated to signal an alarm, operate during the pendency of the alarm condition.

4. Section 15.204 is amended by adding a new paragraph (c) as follows:

Section 15.204 *Receiver Susceptibility to Interference*

* * * * *

(c) Manufacturers are also cautioned to consider close proximity and/or high power operation of non-government licensed services such as Amateur Radio, Broadcast, etc. in designing their equipment for minimum susceptibility and to avoid operation on frequencies used by high power stations. Consult the table of frequency allocations in § 2.106 of this Chapter for information on licensed use of the spectrum- particularly note that high power amateur radio operation occurs in resident[illegible] areas in the bands 144–148, 220–225, and 420–450 MHz.

5. Section 15.205 is amended by revising the note in paragraph (a) and the text and table of paragraph (b) and adding a note below the table in paragraph (b) to read as follows:

Section 15.205 *Technical Standards*

(a) * * *

NOTE: A radiation level below 15 uV/m at 3 meters will be considered to meet this requirement for emissions on frequencies below 1000 MHz. Above 1000 MHz, an emission level below 125 uV/m at 3 meters or equivalent power density level will comply with this requirement.

(b) The transmitter is limited to the frequencies specified below. Subject to the limitation in paragraph (a) of this section, emission of RF energy on the fundamental frequency and spurious and harmonic emissions from the transmitter shall not exceed the levels in the following table.

Fundamental Frequency (MHz)	*Field Strength of Fundamental (uV/m at 3m)*	*Field Strength Harmonics and Spurious (uV/m at 3m)*
40.66 to 40.70	2250	225
70 to 130	1250	125
130 to 174	1250 to 3750 (linear interpolation)	125 to 375 (linear interpolation)
174 to 260	3750	375
260 to 470	3750 to 12500 (linear interpolation)	375 to 1250 (linear interpolation)
470 and above	12500	1250

NOTE: For pulsed operation, measured field strength shall be determined from the

averaged absolute voltage during a 0.1 second interval when field strength is at its maximum value.

* * * * *

6. Paragraph (a) of § 15.207 is amended by removing the words "Section 15.203" and replacing them with the words "Sections 15.201 et seq.".
7. Section 15.215 is amended by removing the words "Section 15.203" and replacing them with the words "Sections 15.201 et seq.".

Appendix B

The measurement procedure MP–1 (1981) is modified as follows:

1. In Paragraph 4.1, delete the present text in the NOTE in its entirety and substitute the following text:

   NOTE: FCC Bulletin OST 55 *Characteristics of Open Field Test Sites* provides further guidance on open field test sites and site calibration measurements.

2. Paragraph 4.2.2 is expanded as follows:

   4.2.2 *Detector Function Selection and Bandwidth*

   For radio-noise meters or spectrum analyzers which include weighting circuits, the detector shall function in an average reading mode. The 6 dB bandwidth of the measuring instrument shall not be less than 100 kHz for field strength measurements over the frequency range of 30 to 1000 MHz. Above 1000 MHz, the measurement bandwidth shall be 1 MHz or greater. Post detector video filters may be used in the case of peak reading spectrum analyzers if correlation can be shown to an average reading radio-noise meter. Alternatively, field strength meters and spectrum analyzers without weighting circuits may be employed, provided measurements are made on the peak basis and recorded as observed. For pulsed, broadband emissions the measured data shall be corrected for pulse desensitization factor (see spectrum analyzer application notes on the subject—i.e. Hewlett Packard AN 150–2). With this correction applied to peak indications, if the duty cycle is known or can be measured, average values of emanations can be calculated.

NOTES

1. The above specified bandwidths have tolerances as prescribed in ANSI standard C63.2–1980.
2. If bandwidths greater than those expressed in 4.2.2 are used, higher readings may result for EUT's with broadband emanations.
3. Data taken with measuring instrumentation employing logarithmic amplifiers when using the average function will represent the average of the logarithm of the voltage level. If the emanation observed is pulsed, broadband observed values will be materially lower than the true average of voltage. Instrument overload is likely to occur with linear IF systems if the emission pulse duty cycle is less than that for which the measuring instrumentation is rated.

3. Paragraph 4.3 is corrected to show that radiated measurements shall be taken in accordance with § 15.142. As corrected, paragraph 4.3 reads as follows:

   4.3 *Frequency Range to be Scanned*

   For radiated measurements, the frequency range specified in § 15.142 of Part 15 Subpart D shall be searched. . . .

4. The last sentence in paragraph 4.5 is corrected by adding the phrase "in its normal operating mode" as follows:

4.5 *Radiated Test Procedure*

. . . shall be recorded. The transmitter shall operate continuously in its normal operating mode for the purpose of those measurements.

5. Figure 1 is modified to show an ellipse for the test site with a minor diameter of 3 D and a major diameter of 2 D where D is the measurement distance (3 meters). The major diameter is along the axis containing the antenna and EUT.

Common Carrier, Costs, Allocation of
Common Carrier, Federal-State Joint Board
Common Carrier, Interstate/Intrastate Separations Process

Commission denied petition for reconsideration of prior decision phasing customer premises equipment out of the separations process.
-*Amendment of Part 67*
CC Docket No. 80–286

FCC 82–492

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board	CC Docket No. 80–286

MEMORANDUM OPINION AND ORDER

Adopted November 4, 1982; Released November 8, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

I. Introduction

1. On February 24, 1982, the Commission adopted a *Decision and Order* approving a recommendation made by the Federal-State Joint Board convened in this proceeding regarding certain changes to the jurisdictional cost separations process. *Amendment of Part 67*, 89 FCC 2d 1 (1982).[1] On March 29, 1982, the North American Telephone Association (NATA) filed a petition seeking reconsideration of the portion of our *Decision and Order* concerning the phased removal of customer premises equipment (CPE) from separations. NATA argues that our decision contravenes both basic ratemaking principles and the purpose of the separations process. On April 26, 1982, the American Telephone and Telegraph Company and the Associated Bell System Companies (AT&T)

[1] Petitions for review pending, MCI Telecommunications Corp. *et. al.* v. FCC, D.C. Circuit Nos. 82–1237, 82–1456 (filed March 4, 1982 and April 23, 1982).

filed a response to the NATA petition, urging the Commission to reconsider its decision in light of "legal uncertainties" raised in NATA's arguments.

2. We have considered NATA's petition and AT&T's response and conclude that we should adhere to our original decision. Therefore, the petition for reconsideration will be denied.

II. Discussion

3. Under the CPE separations plan that we have adopted, no CPE investment or expenses incurred after December 31, 1982 may be allocated to the interstate jurisdiction.[2] A base amount of embedded CPE investment and related expenses, reserves and taxes will be identified by each local carrier for use in the separations process beginning January 1, 1983. This base amount is to be reduced at the rate of one-sixtieth per month for a maximum period of five years. We adopted a phase-out schedule based on a five-year period as a reasonable approximation of the rate at which embedded CPE will be removed from the rate bases of local telephone companies. We explicitly stated that we have not guaranteed that the plan will remain in effect for the full five years, and charged the Joint Board with preparing a recommendation as to how the rate of CPE removal should be integrated with more permanent separations changes.[3]

4. NATA argues that the implementation of this plan will promote the acceleration of the depreciation, sale or transfer of CPE and that, as a result, it is likely that interstate ratepayers will be unfairly burdened with charges that reflect allocations of CPE costs that are no longer actually in the rate bases of local carriers.[4] NATA contends that, since interstate ratepayers would be paying for CPE when the capital investment in the equipment already had been recovered and the equipment is no longer "used and useful," such a result would be contrary to our mandate under Sections 201(b), 204 and 205 of the Communications Act to be certain that rates are just and reasonable. We do not dispute that the CPE separations plan will most likely encourage the sale or transfer of CPE and that, at some point during the phase-out period, some carriers might have less CPE in their actual rate bases than the CPE separations account reflects. However, the plan is intended to provide a temporary allocation mechanism to adjust the jurisdictional separation of costs

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[2] This date corresponds with our bifurcated detariffing date established in the Second Computer Inquiry, 77 FCC 2d 384 (1980), *modified on reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *appeal pending sub nom.* CCIA v. FCC, Case No. 80-1471 (D.C. Cir. 1980).

[3] Decision and Order, para. 38.

[4] NATA has not provided any support for, or indeed explanation of, the proposition that the CPE separations plan would encourage accelerated depreciation rates. The determination of CPE depreciation rates is not related to separations procedures and will be unaffected by the CPE phase out plan.

actually in the rate base. Because it will not allow local carriers to recover revenues that exceed actual revenue requirements, and since it is the most reasonable way to avoid the imposition of undue burdens on both intrastate and interstate ratepayers during the transition period, we are not persuaded that we should make any modifications to the plan.

5. We note first that NATA's reliance on the "used and useful" principle is misplaced. The used and useful principal pertains to the issue of whether a carrier may properly include in its rate base such items as overbuilt plant, discarded, destroyed, lost, obsolete, inadequate or abandoned property, or property currently out of use in the provision of service to the public. *See, e.g., Washington Gas Light v. Baker*, 188 F. 2d 11 (D.C. Cir. 1950); *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). The effect of disallowing such items from either an interstate or intrastate rate base is to protect ratepayers from paying, through combined interstate and intrastate charges, more than the total costs actually incurred by the carrier in the provision of its services. In its petition, NATA argues that, under the CPE separations plan, "the interstate rate base will contain allocations for property which may have been removed from the intrastate rate base and which is no longer a telephone company investment devoted to public service" (p. 6). The implication NATA makes is that interstate allocations of the cost of CPE that has been removed from the intrastate rate base will enable a carrier to recover, in total, more than its actual allowable costs. This view misconstrues the purpose and effect of the CPE separations plan we have adopted.

6. The CPE separations plan merely serves as a mechanism to produce a measured, even shift in the allocation of non-traffic sensitive (NTS) plant from the interstate to intrastate jurisdictions. Whereas current allocation methods applied to NTS plant rely on traffic sensitive measures, the CPE plan introduces, on a temporary and transitional basis, a declining flat-based allocative measure to assure a non-disruptive shift in allocations over a five year period.[5] Although the allocations made through the separations process normally reflect actual costs, their purpose is not to define the costs properly included in the rate base.[6] Rather,

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[5] Currently, all NTS costs are allocated to interstate on the basis of the subscriber plant factor (SPF), a usage sensitive percentage. As the dollar level of NTS costs increases, interstate allocations increase. In a sense, the NTS costs themselves are an integral part of the allocative measure. The use of a prescribed schedule for the phase-out of CPE costs serves as a fixed allocation base which, when combined with other actual NTS costs for separation on the basis of SPF, will define a carrier's dollar share of interstate revenues. For the purposes of a gradual and equitable elimination of the contributionphenomenon, the use of such fixed cost method for CPE on a transitional basis provides the most satisfactory results.

[6] Section 11.18 of the current NARUC-FCC Separations Manual states:

> The separations procedures described in this manual are not to be interpreted as indicating what property, revenues, expenses and taxes, or what items carried in the income, reserve and retained earnings accounts, should or should not be considered in any investigation or rate proceeding.

the purpose is to define the dollar share that a local carrier is entitled to receive from the interstate revenue pool. These revenues are returned to the carrier through the settlements or division of revenues process. The interstate dollars a local carrier receives through the division of revenues or settlements process are subtracted from the total actual revenue requirement (which does not include the cost of removed CPE) to determine the costs to be covered by intrastate rates. Thus, the sum of the amounts paid by interstate and intrastate ratepayers should not exceed the amount necessary to recover costs properly included in a local carrier's rate base.[7] In other words, intrastate and interstate ratepayers will not effectively pay for equipment that is not used and useful. The only thing that the CPE plan affects is the portion of total actual costs (not including the cost of depreciated or sold CPE) that will be borne by interstate ratepayers. According to the formula we have adopted in the CPE separations plan, the interstate share will decline evenly and gradually, and will not fall precipitously for any local carrier as a result of the sudden removal of CPE from the rate base.

7. In the absence of the phase out plan the reduction in rate bases occasioned by the removal of CPE could cause a sudden shift in allocations from the interstate to the intrastate jurisdictions. Under the phase out plan, the effect of CPE removal on the intrastate share will be spread evenly over a five year period as predetermined by the gradual decrease specified in the plan. To the extent that reductions in actual costs resulting from CPE removal exceed the set decrease specified by the plan, thereby temporarily inflating the interstate share, the intrastate share will be proportionately reduced. Technically, because predetermined levels of CPE will be included in separations, interstate ratepayers may make contributions to local carriers, in part, on the basis of separations amounts once calculated to reflect CPE in the rate base but that actually represent CPE that has been removed. However, since it is only the size of the share of interstate revenues and not the local carrier's total actual revenue requirement that is affected, the inclusion of such CPE costs in separations does not provide a mechanism for the recovery of costs that are not properly in the rate base. Interstate ratepayers might temporarily pay higher interstate rates than would otherwise be the case, but under the plan no carrier will be able to cross-subsidize equipment sales becacuse total intrastate and interstate revenues will not exceed those required to cover costs of equipment that is used and useful.

8. NATA's "just and reasonable" argument is also unpersuasive. Although no specific standards for recommendations by a Federal-State

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[7] As a practical matter, some temporary discrepancies inevitably arise due to the infrequency of rate cases and the use of historical data to compute rate bases and revenue requirements. However, the certainty created by the CPE plan should actually help state regulators foresee any necessary adjustments to intrastate rates and minimize these temporary dislocations.

Joint Board regarding jurisdictional separations or for the subsequent review and action on those recommendations by the Commission are set forth in Sections 410(c) and 221(c), we agree with NATA that such actions must be consistent with the general purposes of the Act and that they must be consonant with the pervasive statutory requirement that regulations be just and reasonable. We cannot agree, however, with NATA's conclusion that the phase-out schedule we have adopted in this proceeding will produce unjust and unreasonable rates. Rather, we believe that our decision to adopt the CPE separations plan meets our statutory requirements.

9. The CPE separations plan affects the allocation of non-traffic sensitive costs. As we have explained, the plan effectively serves to allocate actual NTS costs and does not permit recovery, through settlements and the division of revenues, of NTS costs not properly included in the rate base. Since NTS costs are incurred jointly and in common for the provision of intrastate services and do not vary with usage, there is no particular allocation methodology that can be applied to such costs that is inherently more reasonable than any other. All that can be said is that all NTS plant is essential to the provision of both intrastate and interstate services and that both jurisdictions share responsibility for the total fixed amount of NTS costs. On a temporary basis, we have introduced a method of allocation which assigns CPE costs to the interstate jurisdiction on the basis of a fixed amound which is phased out over a five year period in order to provide a reasonable transition. In the course of that transition, interstate ratepayers might contribute revenues for a larger share of NTS costs than they would under other procedures, but that fact by itself does not render the plan unreasonable. On the contrary, any deviations from more traditional separations procedures embodied in this plan are a deliberate part of our effort to minimize the potential for severe dislocations in rates for local service as a result of removing CPE from tariff regulation.

10. Moreover, the just and reasonable standard is not as rigid as NATA seems to believe. Rather, it is a flexible standard which permits some variance from cost of service ratemaking if such variance is justified from the standpoint of the Commission's basic statutory objectives. *See American Television Relay, Inc.*, 63 FCC 2d 911, 924–30 (1977); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776–77 (1968). In this case, we believe that the phase-out schedule is needed to reduce any potential for disruption that might result when CPE is removed from the rate base.[8] This will protect the integrity of the national telecommunications network consistent with Section 151 of the Communications Act. 47 U.S.C. § 151. In reforming separations procedures to facilitate and reflect the implemen-

[8] *See* Decision and Order, paras. 30–33.

tation of our new CPE detariffing policies, both the Federal-State Joint Board and the Commission have had to remain cognizant of the needs of intrastate as well as interstate ratepayers. The Joint Board considered four options for the treatment of CPE: 1) immediate removal of CPE, 2) preservation of current separations procedures, 3) reduction of the allocative factor applied to CPE book costs, and 4) gradual reduction of CPE related investment and expenses for separations purposes. We reemphasize here that we find the phase-out plan to be the best of available options.

11. The first option, the immediate and complete removal of CPE and related expenses from separations, might be most consistent with our conclusion that the provision of CPE is not properly subject to Title II regulation, but might create sudden and substantial rate dislocations. As we explained in our *Decision and Order*, the removal of CPE from tariff regulation under our Second Computer Inquiry decision presents unique considerations for jurisdictional allocations.[9] Even though CPE is priced at full cost in most local jurisdictions, it has been included in the jurisdictional separations process and a portion of CPE costs have been subject to federal jurisdiction as an integral part of end-to-end interstate services. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). This has created a significant contribution phenomenon since the settlements received on the basis of CPE allocations to interstate have been relied upon by local jurisdictions to lower intrastate rates. "Flash-cut" removal was an option that the Federal-State Joint Board, a unique body charged with considering the impact on both intrastate and interstate operations, justifiably found unacceptable.

12. The second option, which is advocated by NATA, is the continued reliance on book costs with allocations made on the basis of the subscriber plant factor (SPF). This option was similarly found by the Joint Board to be ineffective and inappropriate. Such a plan would actually impede the achievement of our detariffing objectives since, as long as settlements are received on the basis of CPE related investment and expenses, there is an incentive for carriers to retain terminal equipment in the rate base as long as possible. The reason for this is apparent; the more equipment the carrier retains in the rate base, the more revenue is allocated to that carrier under the separations process. Thus, in light of the incentives to keep CPE in separations, book costs would not provide an objective measure of a reasonable rate of reduction of the interstate contribution. Moreover, the problem raised by the removal of CPE from separations is unrelated to capital recovery for CPE. Rather, separations merely serves to define the level of contribution which is assigned to the interstate jurisdiction. Amounts not assigned to the interstate jurisdiction would, of course, have to be recovered from intrastate ratepayers. Finally, reliance

[9] Decision and Order, para. 42.

on book costs would create uneven and inequitable results among intrastate ratepayers. This is particularly true for the customers of small telephone companies that rely heavily on the settlements received as a result of the inclusion of a few large pieces of business terminal equipment in the rate base. The sudden removal of this equipment might necessitate precipitous rate increases for such carriers.

13. The third option, which has been advocated by AT&T, is similar to the second option but would involve the reduction of the allocative factor applied to CPE book costs. The Joint Board rejected this option since it would require a premature decision regarding the proper allocative factor of non-traffic sensitive plant (NTS), a matter which is still undergoing investigation.[10] In addition, as was true of the second option, by maintaining a reliance on book costs this approach would create incentives for carriers to retain CPE in the rate base as long as possible.

14. The fourth option provides a direct mechanism for a scheduled phase-out of the contribution phenomenon. The contribution phenomenon addressed by the phase-out plan arises from the effect of the inclusion of CPE in separations calculations on the interstate share. The size of the contribution is identifiable as the difference between the share that results from the inclusion in separations of current CPE costs and the share that will exist when no CPE costs are included. It is for this reason that the "frozen base" was established, i.e., to serve as the appropriate measure for the gradual reduction of the interstate contribution. These separations changes merely establish the percentage of NTS plant assigned interstate by the amount identified through the use of the gradually diminishing base amount. Since the phase-out of the contribution affects only the proportion of actual book costs assigned to interstate, it is not crucial to determine the real rate of the removal of CPE from carriers' rate bases as long as the phase-out takes place over a reasonably realistic period of time. A gradual, measured reduction of the contribution effected through a fixed rate will avoid the uneven results that would ensue from reliance on the actual rate of removal of CPE, and will create the most equitable results for all ratepayers while guaranteeing a smooth transition to competitive terminal equipment markets. Therefore, the Joint Board has recommended, and we have approved, a plan that assures a gradual, even and predictable reduction of the CPE related contribution for all local carriers in all state jurisdictions.[11] We hereby reaffirm that the Joint Board's plan for the gradual elimination of the contribution provides the best means of balancing the need to maintain reasonable rates for

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[10] Recommended Decision and Order, FCC 81–566 (released December 14, 1981), para. 21.

[11] We have recently adopted an amendment to the CPE plan that would permit individual states to select, with the concurrence of affected carriers, an early freeze date for the CPE separations base amount. Amendment of Part 67, FCC 82–242 (released May 28, 1982), 90 FCC 2d 52.

both intrastate and interstate ratepayers with our commitment to the prompt achievement of a fully competitive marketplace for terminal equipment.

15. The reasonableness of this approach is further assured by the fact that we have adopted the plan only as a temporary and interim measure.[12] We have explicitly stated that we have approved a rate of reduction of the CPE base amount, but have not guaranteed the operation of the plan for a full five years. The uncertainty created by the settlement in the Government's antitrust suit against AT&T,[13] which requires the transfer of all CPE owned by divested Bell Operating Companies to AT&T before the end of the five-year period, may necessitate modifications to the original plan. In addition, the ultimate resolution of the treatment of embedded CPE may create the need for adjustments to the plan. The Joint Board has been directed to review these problems and recommend a means of integrating the phase-out rate within its overall plan for more permanent changes to separations procedures.[14] The plan easily can be coordinated with the Joint Board's ultimate decision on the proper allocative factor. Thus, while the plan will be in place on January 1, 1983 to ensure the prompt implementation of our CPE detariffing policies, it is quite possible that the plan, as presently formulated, will not be in place for all local carriers for the full five-year period.

16. Furthermore, we determined that the one-sixtieth per month reduction rate is a reasonable approximation of the actual nationwide rate at which CPE will be removed from most local carriers' rate bases. The choice of a rate based on a five-year phase-out period received substantial support from the parties commenting in this proceeding.[15] In our consideration for the smooth and equitable introduction of new policies, we have decided that the detriments of the possibility of mismatch in this case are far outweighed by the benefits of the plan. Thus, to achieve overall equitable results, a degree of mismatch for particular carriers would not necessarily be adverse to the public interest. We are prepared to reexamine the phase-out plan if it should prove necessary, but at this time we find this is "the kind of issue where a month of experience will be worth a year of hearings." *American Airlines* v. *CAB*, 359 F. 2d 624, 633, *cert. denied*, 385 U.S. 843 (1966).

17. Moreover, even assuming, *arguendo*, that the rates of removal of CPE from rate bases and from separations will not match, we do not believe that this a sufficient reason to alter our decision. First, since many state commissions may be either unprepared or unauthorized to initiate

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[12] Decision and Order, paras. 31, 32, 38.

[13] Modification of Final Judgment, U.S. v. Western Electric Co., Inc. and American Telephone and Telegraph Co., Civil Action No. 82–0192 (D.D.C. filed August 24, 1982).

[14] Decision and Order, para. 38.

[15] Decision and Order, para. 32.

sale programs, there is a significant possibility that many carriers will experience greater reductions in settlements contributions than their actual book costs of CPE would otherwise warrant. This will most likely be true in the early stages of the plan since, even in those states that are anxious to begin sale programs, the administrative difficulties of implementing such programs might result in substantial lags in the deregulation of embedded CPE. Finally, if it does become apparent that CPE book costs and separations allocations are significantly mismatched, and it is clear that the public interest is not being served, the plan could be reviewed again by the Federal-State Joint Board and adjusted.

18. NATA also argues that our adoption of the plan contravenes the very purpose of the separations process, which is to identify and isolate the "competent governmental authority in each field of regulation." *Smith v. Illinois Bell, supra.* NATA contends that our concern for minimizing any adverse impact of our CPE detariffing policies on intrastate rates is unrelated to our authority to establish reasonable interstate rates. We reject this argument. We are approving a change in the jurisdictional separations process. Such a decision, with consequences for both intrastate and interstate services, can only be made after recommendation by a Joint Board. In reviewing the action of the Joint Board, it is manifest that we must consider both federal and state concerns. Moreover, the decision goes to the implementation of separations procedures, and does not, in any way, alter the legal constraints on each regulatory authority to review only those rates within its own jurisdiction. Therefore, our action does not constitute an "intrusion by the FCC through the separation process into intrastate ratemaking."[16]

19. As a final matter, NATA maintains that the CPE separations plan is inconsistent with our intention to address the transitional mechanism for deregulating embedded CPE in a separate "implementation proceeding."[17] NATA recommends that we withhold action on the separations treatment of embedded CPE until a deregulation schedule for that equipment has been chosen. We do not believe that this is desirable or necessary. We have already determined that it is necessary that a separation plan be in place on January 1, 1983. The separations plan developed by the Joint Board provides a means of coordinating the reduction of settlements contributions that will inevitably result from the detariffing of terminal equipment through either state or federal action. Because the present Joint Board is scheduled to complete its design of a comprehensive recommendation for separations changes by early 1983, it is prudent to address the contribution issue now rather than to wait and convene a separate Joint Board at a later date.

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[16] NATA, Petition for Reconsideration, p. 10.

[17] Second Computer Inquiry, 84 FCC 2d 50, 67 (1980).

III. Ordering Clauses

20. Accordingly, IT IS ORDERED, That, pursuant to Sections 4(i), 221(c), 403 and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. § § 154(i), 221(c), 403, 405, and 410(c), the North American Telephone Association petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

Federal Communications Commission Reports

Agreement, Formal
Common Carrier, Interconnection, Carrier-to-Carrier
Common Carrier, Interconnection, Specialized Common Carrier
Common Carrier, Specialized Services
Message Telephone Service
Wide Area Telephone Service (WATS)

AT&T petition for ruling granted to the extent that Commission declares that ENFIA tariff applies to exchange usage by interstate MTS/WATS-type switched message services except where the same exchange usage has been paid for by an underlying carrier through either ENFIA or separations process.
-*AT&T Co.*
CC Docket No. 82–619

FCC 82–438

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Telephone and Telegraph Company	CC Docket No. 82–619

Applicability of the ENFIA Tariff to Certain OCC Services
CC Docket No. 82–619

ORDER

Adopted October 6, 1982; Released: October 19, 1982

BY THE COMMISSION:

1. On August 19, 1982, the American Telephone and Telegraph Company (AT&T), on its own behalf and on behalf of the Bell System Operating Companies (BSOCs) filed an emergency petition asking us to declare: (1) that MCI's usage of local exchange facilities in providing interstate

MTS/WATS-type services is governed by the BSOC 8 (ENFIA) tariff (except for resale of MTS and WATS), whether or not such services involve use of facilities leased from other carriers, and (2) that MCI's failure to make payments required by that tariff is unlawful. In response to public notices inviting public comment on this petition, pleadings were filed by the Association of Long Distance Telephone Companies (ALTEL); MCI Telecommunications Corporation (MCI); jointly by Satelco, Incorporated, Tel Systems Management Corporation and Teltec Saving Communications Company (Joint Resellers); Southern Pacific Communications Company (SPCC); and U.S. Telephone Communications, Incorporated (U.S. Tel).

2. In their comments, these Other Common Carriers (OCCs) and resellers urge us either to recognize an exemption from the application of the ENFIA tariff in instances where exchange connections are obtained through resold facilities and services, or to recognize a categorical exemption from ENFIA for "pure resellers" who do not use any of their own facilities in the provision of intercity services. In light of the terms of applicability of the ENFIA tariff, and the lack of any modification of the tariff, we find that ENFIA charges apply to each end of MCI's MTS/WATS-like services regardless of whether any segment of the network over which those services are provided incorporates resold facilities. Therefore, for reasons discussed more fully below, and to the extent indicated, AT&T's petition is granted.

I. Background

3. The ENFIA tariff establishes charges to be paid by OCCs for access to BSOC local exchange facilities in the provision of end-to-end MTS/WATS-like services. The ENFIA tariff is an interim "rough justice" arrangement based on a negotiated agreement between AT&T and several of the OCCs including MCI. The agreement provides for the calculation of charges for three separate elements. Element 1 applies to the line between the OCC switch and the telephone company Class 5 local exchange switch. The specific rates for Element 1 are determined by reference to charges for such lines in other telephone company tariffs. Element 2 covers the use of the traffic sensitive switching and trunking facilities, and Element 3 provides a mechanism for simulating the compensation local carriers receive for MTS or WATS use of non-traffic sensitive (NTS) local exchange plant.

4. We initially accepted the ENFIA Agreement in 1979 and allowed the implementing BSOC 8 tariff to go into effect for three years. *Exchange Network Facilities for Interstate Access (ENFIA)*, 71 FCC 2d 440 (1979). In accordance with the terms of the original agreement, we recently found that, since a more permanent access charge mechanism has not yet been implemented, the public interest would be served by an extension of

the arrangement for a maximum period of an additional two years. *Extension of ENFIA Agreement* (Extension Order), 90 FCC 2nd 6 (1982)[1] The ENFIA tariff will be superseded by the access charges that will be established pursuant to a final decision in CC Docket No. 78–72, the MTS/WATS Market Structure Inquiry. *See Fourth Supplemental Notice of Inquiry and Proposed Rulemaking*, FCC 82–247 (released June 4, 1982), 90 FCC 2d 135.

5. By its terms, the ENFIA tariff applies only to "Execunet/Sprint-type interstate services" or "any end-to-end MTS/WATS-type interstate services."[2] The ENFIA Agreement is limited to ensuring that an equitable share of cost responsibility for jointly used subscriber plant is assigned to the OCS insofar as those OCCs offer MTS/WATS equivalent services. BSOCs are paid for the use of their local exchange facilities in connection with AT&T's MTS and WATS services through the separations and division of revenues processes. The ENFIA Agreement sought to provide a mechanism for establishing reasonable parity between MTS/WATS compensation and MTS/WATS equivalent compensation to local carriers. The rates under the ENFIA tariff are somewhat lower than the compensation BSOCs receive from MTS and WATS, but are greater than the local business rates that the OCCs had originally paid for exchange connections before the *Execunet* decisions established that the OCCs could offer MTS/WATS-type services.[3] The ENFIA Agreement does not include services which are connected with exchange facilities at only one end such as foreign exchange (FX) and common control switching arrangements with off-network access lines (CCSA/ONALS). Local companies receive compensation for these services under an entirely different mechanism than that used for MTS and WATS or other MTS/WATS-type services. *ENFIA*, 71 FCC 2d at 444.[4]

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[1] *Review pending*, MCI Telecommunications Corp. v. FCC, D.C. Cir. No. 82–1553 (filed May 18, 1982). Shortly after the agreement was extended, AT&T filed proposed increases to its BSOC 8 tariff. We found that there were substantial questions concerning the lawfulness of these revisions and their conformity with the language and intent of the agreement. Therefore, we suspended the effectiveness of the proposed increases for five months and instituted an investigation to determine the proper rates. *Exchange Network Facilities (ENFIA)* 90 FCC 2d 202 (1982) (Designation Order), FCC 82–431 (released September 29, 1982), *review pending*, MCI Telecommunications Corp. v. FCC, D.C. Cir. No. 82–1554 (filed May 18, 1982). The two review proceedings have been consolidated.

[2] The criteria for identifying such services were first articulated in MCI Telecommunications Corp., 60 FCC 2d 25 (1976), *reversed on other grounds*, 561 F.2d 265 (D.C. Cir. 1977) *cert. denied*, 434 U.S. 1040 (1978). They include sharing of intercity facilities by all users, direct access on demand by a customer, use of common local exchange plant at both ends and customer billing on a per call basis subject to time and distance or a monthly minimum.

[3] MCI Telecommunications Corp. v. FCC, 561 F. 2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Execunet I); 580 F. 2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980 (Execunet II).

[4] An FX subscriber obtains a connection to the foreign exchange under private line tariffs. Similarly, private line tariffs establish the charges for a CCSA customer's dedicated lines and switches. Interstate private line revenues are included in the telephone industry "partnership" pool, and the share of these revenues received by a local company through the division of revenues/settlements

6. The ENFIA Agreement focuses on the functional equivalency between MTS/WATS and OCC Execunet/SPRINT-type services rather than on the specific facilities used. Similarly, the tariff does not specify particular network configurations that are considered to create MTS/WATS-like services. Our relaxation of resale restrictions[5] has led to the development of numerous variations in the technical configurations employed by non-telephone company carriers in the provision of telecommunications services. The applicability of ENFIA to some of these configurations is the essence of the controversy now before us.

7. Aspects of this issue have already been addressed by the Chief of the Common Carrier Bureau in two separate instances. In *Leased Data Services*, Mimeo 32441 (released June 12, 1980), the Bureau determined that ENFIA applied to the use by LDS of originating cities' exchange facilities in the provision of a resale service that involved leased private line connections from specified locations to an intermediate city where connection was made to MCI's Execunet Service. Even though the use of exchange facilities in the originating cities was outbound only, and although local carriers in the intermediate and termination cities were compensated for the use of their facilities through MCI's ENFIA payments, it was determined that LDS provided an end-to-end MTS/WATS-type service from the point of origination that was subject to the ENFIA tariff.[6] In *AT&T Transmittal No. 41*, Mimeo 001153 (released May 29, 1981) *recon. pending*, the Bureau rejected a revision to the ENFIA tariff proposed by AT&T that would have deleted from Section 1.1 of the regulations in the ENFIA tariff the following language: "this tariff does not apply to services offered by the Telephone Company." According to

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process is determined by the portion of associated investment and expenses assigned to the interstate jurisdiction through separations. Private line costs are directly assigned to the relevant jurisdiction. Origination and termination at the "open end" of FX and CCSA/ONAL services are provided at the business local exchange rate. These exchange revenues and expenses are treated as intrastate for separations purposes. For a further description of these services *see, e.g.*, MTS and WATS Market Structure, 77 FCC 2d 224, 228–229 (1980); New York Telephone Company, 76 FCC 2d 349 (1980).

[5] Resale occurs when a user subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without "adding value") for a profit. In Docket 20097 it was determined that subscribers of AT&T's private line services should be allowed to participate in the unlimited resale and sharing of such services provided they are not converted into MTS or WATS or their equivalents. Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), *reconsideration*, 62 FCC 2d 88 (1977), *aff'd sub nom.*, AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). Resale and sharing of MTS and WATS was authorized in CC Docket No. 80–54, Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 77 FCC 2d 274 (1980), 83 FCC 2d 167 (1980), *recon. denied*, 86 FCC 2d 820 (1981), *petitions for review denied*, Southern Pacific Communications Company v. FCC, 682 F. 2d 232 (D.C. Cir. 1982). We are now considering removal of the remaining restrictions on resale of AT&T's private line services in CC Docket No. 82–44, AT&T, FCC 82–51 (released February 4, 1982), 88 FCC 2d 1406.

[6] ENFIA payments were collected in the intermediate and termination cities from MCI only, avoiding double compensation from LDS in those cities.

AT&T, this revision would have clarified the applicability of ENFIA to resellers of MTS and WATS. The Bureau disagreed with AT&T's contention that resold MTS and WATS are in fact "MTS/WATS-type interstate services" within the meaning of ENFIA tariff, on the basis that even when MTS and WATS are resold, local carriers are compensated for the use of their exchange facilities through the separations and division of revenues/settlements processes.[7]

8. At the time that the extension of the ENFIA Agreement was under consideration, questions regarding the applicability of ENFIA to resellers were raised in petitions or pleading filed in CC Docket No. 78–371 by U.S. TEL and Tel Systems Management (TSM), Teltec and ALTEL. These resellers voiced a concern that the application of ENFIA to their services constitutes unjust and unreasonable discrimination with respect to access charges paid by resellers and those paid by providers of other services including sharers of interstate telecommunications services and users of MTS/WATS equivalent services such as FX, CCSA/ONALS, and point to point private line who pay only local business rates for exchange access. Rather than delay our consideration of the more general issue of the extension of the ENFIA Agreement, we noted in Footnote 8 of our Extension Order[8] and Footnote 10 of our Designation Order[9] that certain matters regarding the application of ENFIA to resellers were not pertinent to the basic issues regarding the viability and implementation of the ENFIA Agreement.

9. MCI has now interpreted these footnotes as an affirmative decision on the part of the Commission to categorically exclude all resellers from the ENFIA tariff.[10] Beginning in May, 1982, MCI stated that it expected

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[7] The Bureau found no inconsistency between this decision and its earlier decision in *Leased Data Services* since the interstate traffic carried by LDS was never transmitted via AT&T's interstate switched message services.

[8] This footnote states:

The applicability of ENFIA charges to resellers, an issue raised by U.S. TEL and TSM is outside the scope of this particular decision and will be treated separately.

[9] This footnote states:

> We also received petitions or comments from resale carriers U.S. Tel and Teltec and from ALTEL, a trade association which includes resale carriers. They deny that ENFIA should apply to resellers, but state that AT&T imposes ENFIA charges on them in fact. They contend that the Commission should reject the increases, which they claim could force them out of business, or not apply them to resellers. We note in this regard, however, that the Common Carrier Bureau has specifically ruled that ENFIA does not apply to MTS/WATS at present. AT&T (ENFIA), Mimeo No. 001153, released May 29, 1981, *recon. pending*. Moreover, although we are considering the removal of the ban against resale of AT&T's private line services if such services are used to form MTS/WATS equivalents, we have not as yet taken such action. AT&T, CC Docket No. 82–44, FCC 82–51, released February 4, 1982, 88 FCC 2d 1406.

[10] Based on the same interpretation of these footnotes, on July 13, 1982 U.S. Tel filed a formal complaint pursuant to Section 208 of the Communications Act and Section 1.721 of our Rules alleging that the imposition of ENFIA charges for interconnection of its services with local exchanges is unjust and unreasonably discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act.

to pay business exchange rates for local access to certain resold circuits used in the provision of its Execunet service. MCI initially paid the ENFIA rates under protest and requested that the BSOCs adjust their invoices to reflect the lower exchange rate for designated circuits.[11] In June, 1982, upon receipt of unadjusted invoices from the BSOCs, MCI began to withhold payment for access to the resold circuits on the theory that substantial overpayment for these circuits had been remitted in May. On August 19, 1982, AT&T filed its emergency petition for a declaratory ruling.

II. Contentions of the Parties

10. AT&T contends that neither Footnote 8 to the Extension Order nor Footnote 10 to the Designation Order modified the ENFIA Agreement to exempt resale carriers engaged in the provision of MTS/WATS-type services from ENFIA charges. AT&T maintains that the resold circuits used by MCI merely extend that carrier's intercity network, and do not alter the fundamental character of MCI's end-to-end MTS/WATS-type service. AT&T asserts that the basic issue is whether the proper compensation is received by local telephone companies rather than whether a particular intercity carrier is a reseller and that, except in the case of resold MTS and WATS, the ENFIA agreement requires that all affected local carriers be compensated for interconnection to MCI's service.

11. MCI and SPCC maintain that ENFIA does not apply to resold facilities and ask that AT&T's petition be denied. MCI argues that, regardless of the applicability of ENFIA to resale prior to the Extension Order, an exemption for resellers has now been affirmatively established in Footnote 8 of that order, and further that the exemption is sweeping and applies to all resellers. According to MCI, as a result of our "ruling" in the Extension Order, ENFIA charges are now applicable only to direct connections between OCC terminals and serving central offices, but that charges for exchange connections to resold facilities have reverted to the business local exchange rate. MCI also questions the practicality of applying ENFIA to resellers since, under our *Competitive Carrier Rulemaking*, FCC 82–350 (released August 20, 1982), resellers are now exempted from certification requirements under Section 214, making the identification of those resellers properly subject to ENFIA more difficult and creating opportunities for double charging carriers who resell OCC services for which ENFIA payments have already been made. SPCC argues that the original ENFIA Agreement never contemplated resold facilities and that the definition in the ENFIA tariff of "Jointly Used

[11] The Chairman of the Board of MCI also wrote to the Chairman of this Commission indicating that, with respect to certain circuits, MCI considered itself a reseller exempt from ENFIA under our Extension Order. Letter dated June 28, 1982 from William G. McGowan to Chairman Fowler.

Subscriber Plant" which refers to an "OCC's intercity network" plainly excludes calls completed over another carrier's network. MCI and SPCC both dispute AT&T's contention that compensation of the local exchange carrier is a pivotal issue. SPCC observes that there are currently numerous instances in which exchange access is provided for *de facto* MTS/WATS equivalents such as FX, CCSA, FTS and AT&T's Enhanced Private Switched Communications Service in a manner that does not provide a contribution to local exchange costs.

12. ALTEL, U.S. Tel and the Joint Resellers contend that pure resellers should be distinguished from established, facilities-based OCCs, and should be exempted from ENFIA rates. They fear that a decision granting AT&T's petition with respect to MCI will have a direct adverse impact on their interests. These parties claim that the services they provide are fundamentally different from those provided by the ENFIA Agreement signatories since pure resellers own virtually none of their own facilities, rely heavily on the resale of higher cost AT&T intercity services, and often offer interstate universal service on an outward only basis generating lower usage in the local exchange. They claim that the imposition of ENFIA on their operations places them at a competitive disadvantage with respect to the established facilities-based OCCs, and creates disincentives for the expansion of resale services. They argue that the continued application of ENFIA to resellers would be contrary to the position taken by the Commission in Footnotes 8 and 10 in our April, 1982 ENFIA orders. They also maintain that it would exacerbate the discrimination that currently exists between access charges for end-to-end MTS/WATS-type services and the local business rate applied to other MTS/WATS equivalents such as FX and CCSA/ONALS. ALTEL further comments that ENFIA charges are currently applied inconsistently to resellers, sometimes resulting in double compensation for the use of local exchange facilities, and often resulting in the circumvention of the prohibitions against the resale of AT&T's private line services for the purpose of creating MTS/WATS equivalents.

13. ALTEL requests that we reaffirm that ENFIA charges do not apply to resellers and that we direct AT&T to alter the ENFIA tariffs to provide exchange network access to resellers at local exchange business rates pending the resolution of access charge issues in CC Docket No. 78–72. The Joint Resellers ask that any ruling that we make on AT&T's petition be specifically limited to AT&T's relationship with MCI, and that the obligations of pure resellers under the ENFIA tariff be addressed in a broader proceeding. Similarly, although U.S. Tel summarizes the position taken in its Complaint, it maintains that without the procedural safeguards of a broader proceeding resolution of the instant matter in

favor of AT&T will have an adverse impact on its Complaint, and therefore asks that AT&T's petition be dismissed.[12]

III. Discussion

14. It is apparent that great confusion has ensued from indications that we have given that the provision of certain services by resellers present unique questions under ENFIA. Under the language of the tariff itself, no distinctions are made between resellers and non-resellers or between pure and partial resellers. Thus the use of such distinctions would lead to improper applications of the tariff. Prior to our April orders, MCI paid ENFIA charges for the disputed circuits and its opposition to AT&T's petition is premised on the argument that we have now exempted it from such payments. However, in the context of our actions to extend ENFIA we did not exempt any carrier from the ENFIA tariff merely on the basis of its status in whole or in part as a reseller. In this respect, we agree with AT&T that, in order for such an exemption to exist, the ENFIA Agreement would have to have been altered, and no such modification has been made.[13] We also disagree with SPCC that the reference in the ENFIA tariff to an "OCC's intercity network" excludes networks that are built in part with leased facilities and services. The language of the ENFIA tariff is addressed to exchange access for end-to-end MTS/WATS-type services and its applicability does not turn on whether the facilities used to provide these services are leased or owned.

15. It is our interpretation of the ENFIA tariff that the touchstone for its applicability is not the status of a carrier as a reseller or as a facilities-based entity. Rather, it is the compensation that is due to a local carrier according to the agrement that led to adoption of our original ENFIA decision and the tariff filed to implement that agreement. The parties to ENFIA acknowledged that:

> "The agreement is patterned after the method by which local telephone companies are presently compensated for use of exchange facilities for traditional interstate MTS and WATS services. The basic methodology is one of compensating the local telephone companies for the costs they incur in carrying interstate MTS and WATS calls, and in adapting their facilities and procedures for carrying such calls. 71 FCC 2d at 444–45.

As we pointed out in our recent ENFIA Rate Order (FCC 82–431, released September 29, 1982) the ENFIA Agreement reflects "separa-

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[12] We note that the action we take in this matter does not dispose of U.S. Tel's complaint. We hold merely that ENFIA rates are applicable to interconnections or MTS/WATS equivalent services without regard to whether the intercity facilities used in those services belong to the OCC or are resold facilities belonging to AT&T or another carrier. Our ruling here does not foreclose the availability of a later ruling, in the context of a complaint by U.S. Tel or another reseller, that actual rates are unjust, unreasonable or unduly discriminatory, if the complainant can make a case for such a ruling.

[13] *See* FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). *See also* MCI v. FCC, 665 F.2d 1300, 1303 (D.C. Cir. 1981).

tions and division of revenues/settlements processes by which local carriers share in the interstate revenues according to their costs." (p. 12). Under the Separations Manual, interstate MTS and WATS minutes are counted (i.e., SPF'ed) once—and only once—at each end. We believe that it was the intention of the ENFIA Agreement, as well as the implementing tariff based upon it, that correlative treatment be afforded MTS-WATS equivalent services and that exchange usage by any interstate MTS/WATS-type switched message service should be paid for under ENFIA (or separations in the case of resold MTS or WATS) once—but only once—at each end.[14] We recognize that there are instances where MTS/WATS-type services are provided at least partially through the resale of OCC Execunet/SPRINT services. In such cases, we do not believe it appropriate that ENFIA be applied twice for the termination of an interstate call in a single city.

16. In interpreting and applying the ENFIA tariff there appears to be no sound basis here for distinguishing between those carriers who provide services over their own intercity facilities and those who have chosen to lease those intercity facilities from AT&T or another carrier. There is also no basis for distinguishing between the charges to be applied for exchange access on those routes where a particular carrier, such as MCI, has chosen to use its own facilities rather than those of AT&T or another carrier. Since ENFIA rates are generally higher than the applicable local charges, such a distinction would simply penalize carriers who have built their own facilities.

17. We are aware, and several parties pointed out to us, that there are differences in treatment that currently exist between MTS/WATS-equivalent services subject to ENFIA and certain interstate services for which users pay only local business rates for connection to local facilities. A resolution of these differences, however, is a matter outside the scope of this declaratory ruling proceeding. As previously noted, the consistent practice under the Separations Manual has been to assign the minutes of use of the "open-end" of FX service and CCSA/ONAL service to the intrastate jurisdiction.[15] In contrast, the minutes of use of the exchange plant associated with MTS/WATS equivalent service—as in the case of MTS/WATS itself—have been treated as interstate. The ENFIA agreement and the order accepting it recognized this distinction in treatment for MTS/WATS equivalent services, on the one hand, and FX and CCSA/

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[14] By "end" we mean any local exchange in which usage of an MTS/WATS-type service may be originated or terminated. This standard does not alter the exemption of FX and CCSA/ONALS from ENFIA since, although we have asserted jurisdiction over the charges paid by interstate customers of these services, New York Telephone, 76 FCC 2d 349, we have not, as yet, asserted jurisdiction over the relevant costs, expenses and revenues through the separations process.

[15] Note 4, *supra*.

ONAL "open-end" service, on the other.[16] We anticipate that any anomaly caused by this disparate treatment will be eliminated when the appropriate changes have been made to separations procedures by the Federal-State Joint Board in CC Docket No. 80–286,[17] and a comprehensive access charge plan is in place.[18]

18. For the purposes of this petition, we have undertaken an interpretation of the tariff in order to clarify statements that we have previously made and to demonstrate the reasons why MCI must pay ENFIA charges on the disputed circuits. We recognize, however, that because of the unique nature of the ENFIA tariff, further disagreements regarding its applicability to the increasingly varied configurations used in the provision of MTS/WATS-type services might arise. Such disputes are properly resolved through the complaint mechanism established in Section 208 of the Communications Act and Section 1.721 of our Rules.

19. Accordingly, IT IS HEREBY ORDERED, That, pursuant to Sections 4(i), (j), 201, 203 and 205(a) of the Communications Act, 47 U.S.C. §§ 154(i), (j), 201, 203 and 205(a), the American Telephone and Telegraph Company's Emergency Petition for Declaratory Ruling IS GRANTED, to the extent that we are declaring that the ENFIA tariff applies to exchange usage by interstate MTS/WATS-type switched message services except where the same exchange usage has been paid for in that city by an underlying carrier through either ENFIA or the separations process.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[16] 71 FCC 2d at 444. This difference does not favor AT&T's MTS/WATS offering over those of its competitors.

[17] *See* Amendment of Part 67 and Establishment of a Joint Board, 78 FCC 2d 837, 845 (1980).

[18] Fourth Supplemental Notice in CC Docket No. 78–72, *supra*.

Common Carrier, Interconnection, Connecting Arrangements
Common Carrier, Operating Expenses
Subsidiary Company

Memorandum Opinion and Order adopted concerning AT&T's request for approval to capitalize a separate subsidiary to provide new customer premises equipment pursuant to Section 64.702(d)(4) of rules.
—*AT&T Co.*

FCC 82–496

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

American Telephone and Telegraph Company

Request for approval to supplement the capitalization of American Bell, Inc. to provide new customer premises equipment

Request for partial reconsideration of an order permitting AT&T to capitalize a separate subsidiary to provide enhanced services pursuant to Section 64.702(d)(4) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1982; Released November 10, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

I. Introduction

1. In the Second Computer Inquiry (Computer II), the Commission concluded that the provision of enhanced services and customer premises equipment (CPE) is not subject to regulation under Title II of the Communications Act of 1934, as amended.[1] As a consequence, enhanced

[1] Second Computer Inquiry (*Final Decision*), 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration*), *recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration*), *further reconsideration pending, appeal pending sub nom.* Computer and Communications Industry Associations v. FCC (D.C. Cir. No. 80–1471, filed May 5, 1980).

services and "new," as distinguished from "embedded" CPE may not be offered under tariff after January 1, 1983.[2] Because of American Telephone and Telegraph's (AT&T's) unique status in the provision of telecommunications services and equipment, the Commission required AT&T to offer enhanced services and CPE only through a separate subsidiary. Section 64.702 of the Commission's rules was amended to prescribe the relationship between the separate subsidiary and affiliated entities. 47 C.F.R. § 64.702.

2. Section 64.702(d)(4) requires, in part, that AT&T obtain Commission approval of its capitalization of the separate subsidiary. In addition, the Commission required AT&T to submit its proposed capitalization plan 180 days prior to the formation of the subsidiary. 88 FCC 2d at 537. On November 30, 1981, AT&T filed a capitalization plan for a separate subsidiary, American Bell, Inc. (AmBell). On June 10, 1982, the Commission approved AT&T's enhanced services capitalization plan with modifications. *Enhanced Services Capitalization*, 90 FCC 2d 404 (1982) (*Enhanced Services Order*).[3] On July 1, 1982, AT&T filed a supplement to AmBell's capitalization plan to enable it to offer new CPE beginning January 1, 1983 and for AmBell to install and maintain all Bell system business CPE systems no later than July 1, 1984. Comments on AT&T's capitalization plan were filed by state commissions and potential competitors of AmBell.

II. Summary of Capitalization Plan

3. AT&T seeks a total capitalization of AmBell of approximately $5 billion. Its CPE capitalization plan addresses five subjects: (1) initial capitalization as of January 1, 1983 for AmBell's provision of new CPE and for AmBell's provision of installation and maintenance (I&M) services for all Bell System business CPE systems, by July 1, 1984; (2) additional AmBell financing requirements for 1983 through 1985; (3) affiliated company expenses related to the development of new CPE and formation of the subsidiary; (4) the anticipated effect of the requested funding levels on basic services and rates; and (5) the appropriate role of the various state commissions concerning the transfer of assets from the Bell Operating

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[2] "New CPE" is customer premises epuipment which is not in service, or not subject to the separations process, i.e., not in BOC inventory or in the process of being refurbished, and is offered to customers after January 1, 1983. *Reconsideration*, at 66–67; *Order on Further Reconsideration*, 88 FCC 2d 512, 525–27 (1981). CPE "includes all equipment provided by common carriers and located on customer premises except over voltage protection epuipment, inside wiring, coin operated or pay telephones and multiplexing epuipment to delivery multiple channels to the customers." *Reconsideration*, at 61, n.10.

[3] AT&T has sought reconsideration of our Enhanced Service Order. Because its petition for reconsideration raises issues that are relevant to our consideration of the CPE Capitalization proposal, its petition is being addressed in the instant order.

Companies (BOCs) to AmBell.[4] AT&T's filing also includes a discussion of methodologies used to separate the risks associated with AT&T's regulated operations from its unregulated businesses and a description of AmBell's relation to other Bell System affiliates.

4. AT&T seeks to transfer to AmBell, as of January 1, 1983, current assets of $137 million and capital assets with a $158 million net plant value (including restoration of deferred taxes on Western Electric profit). Of the $158 million in capital assets, approximately $88 million is provided by the BOCs, $63 million is provided by Bell Telephone Laboratories, Inc. (BTL), and $5 million is provided by Western Electric Co. (Western) and $2 million from other AT&T affiliates. The capital assets to be received from the BOCs consist of investment in buildings and leasehold improvements and furniture and fixtures. The capital assets to be received from BTL consist of investment in computer equipment, machinery and laboratory apparatus, special service facilities, and furniture and fixtures. The capital assets to be received from AT&T will consist of furniture and fixtures.

5. AT&T also seeks authority to transfer by July 1, 1984, $178 million in current assets and land, buildings, leasehold improvements, furniture and fixtures, computers, motor vehicles and other equipment with a total net plant value of $280 million from the Bell Operating Companies (BOCs) to AmBell's proposed installation and maintenance operations. AT&T states that transfer of these assets is necessary to enable AmBell to provide for installation and maintenance of all Bell System business CPE systems including any embedded systems that may still be owned by affiliates. AT&T proposes to reflect past federal income tax benefits associated with the capital assets by effecting the transfer at adjusted net book value. AT&T proposes to reimburse the affiliates for the transferred assets by means of an exchange of stock.

6. AT&T requests authorization of additional financing for the years 1983 through 1986 in the amount of $4.265 billion. The asset transfer described above and the capitalization approved by the Commission's June 16, 1982 order amount to a total capitalization of AmBell of $5.018 billion. Although AT&T provides a year-by-year estimate of financing needs, it seeks Commission approval of aggregate amounts to give AT&T the flexibility to meet changing market conditions. AT&T also states that

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[4] AT&T's July 1 capitalization plan does not reflect any transfer after January 1, 1983 of embedded CPE owned by the BOCs on that date. Disposition of embedded CPE will be addressed in the Implementation Proceeding (CC Docket No. 81–893), 89 FCC 2d 694 (1982) (*Implementation Proceeding*). Neither does it reflect the proposed transfer of assets related to Picturephone Meeting Services (PMS). On September 30, 1982, AT&T had filed a plan to capitalize AmBell to permit it to acquire certain BOC assets to provide PMS. We are delegating to the Chief of the Common Carrier Bureau authority to review and approve AT&T's plans for the capitalization of AmBell's offer of PMS, or, if appropriate, seek our adoption of an order disapproving AT&T's PMS capitalization plan.

if funding needed for new technological or market opportunities exceeds AmBell's ability to generate funds internally, AT&T will seek our approval to further finance AmBell.

7. In the Computer II *Final Decision* at para. 258 and the *Reconsideration* at para. 105, the Commission required that AT&T account for CPE development and formation expenses incurred prior to the commencement of the subsidiary's CPE operations. AT&T states that these preoperational expenses funded by the BOCs and Long Lines will total about $246 million by January 1, 1983. Western Electric will have funded an additional $500 million of such expenses, and other AT&T departments will have provided $218 million. AT&T states that, following approval of its July 1, plan, the BOCs and Long Lines will be reimbursed by AT&T for the funding provided by them. AT&T proposes to account for this reimbursement as delayed items under § 31.01-5 of the Commission's Rules. AT&T provides for no reimbursement of Western Electric. AT&T's earnings objectives for AmBell will include recovery of the reimbursements provided to Long Lines and the BOCs.

III. Discussion

A. Review Criteria and Procedures

8. This proceeding represents a continuation of our regulatory oversight with respect to the implementation of our Computer II policy determinations. As of January 1, 1983, if AT&T wishes to provide new CPE, it must do so on a non-tariffed basis through a separate subsidiary. As part of this requirement, AT&T must obtain Commission approval of the funding requirements necessary to support the subsidiary's CPE activities. The instant proposal addresses capitalization requirements for CPE and constitutes the second phase of our overall review process with respect to AT&T's corporate plans for capitalizing its enhanced services/CPE separate subsidiary.

9. Our review of AT&T's CPE proposal is similar to that undertaken in our *Enhanced Services Order.* Our objectives in requiring approval of AT&T's capitalization plans are to ensure (a) that transfers of assets during capitalization not serve as vehicles for inappropriate subsidies to the detriment of basic service ratepayers, (b) that to the extent costs are incurred in the development of CPE prior to the establishment of the separate subsidiary, such costs are accounted for, and (c) that the subsidiary, at the end of some determinate period, be in a position to establish its financial independence and assume for itself the risks associated with its competitive ventures. 77 FCC 2d at 485. Together with structural separation and accounting safeguards, these criteria reflect the Commission's intention that the activities of AT&T and its affiliates on behalf of the separate subsidiary, and the activities of the subsidiary itself, not ad-

versely affect the rates for AT&T's basic communications services or the quality of these services. It is with these objectives in mind that we consider the reasonableness of AT&T's proposal.

10. Our review efforts focus on three separate areas. Two relate directly to the capitalization proposals for AmBell and how AT&T has accounted for preoperational expenses associated with the development of CPE and formation of the subsidiary. The third area of focus relates to AT&T's efforts to comply with the Computer II structural separation requirements. The Commission's review process is conducted at two levels. First, we have utilized notice and comment procedures to facilitate public participation. Numerous comments have been filed and considered in assessing AT&T's capitalization plan.[5] Second, a separate staff review is being conducted. The staff review focuses on verifying (a) whether AT&T has properly accounted for preoperational expenses and (b) whether the operations of the subsidiary are structured in a way consistent with the requirements of Computer II. These two procedures facilitate an in-depth examination of the reasonableness and adequacy of AT&T's proposed capitalization plan.

11. Unlike the *Enhanced Services Order*, we are not addressing all three separate areas at this time in one comprehensive document. Because AT&T must alter its method of providing new CPE as of January 1, 1983, we must necessarily address first those matters which directly affect its financial and operational ability to provide new CPE through AmBell as of this date. Accordingly, in this order we shall address those aspects of AT&T's capitalization plan which require Commission action so as to enable AmBell to commence the provision of new CPE as of January 1, 1983. These issues concern funding levels and their impact on basic services and the transfer of specific capital assets. We shall also address those issues relevant to AT&T's proposal for AmBell's provision of installation and maintenance for all CPE—embedded and new—after the 18 month transition period. In addition, we shall set forth the general

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[5] On July 30, 1982, parties filed comments on AT&T's July 1, 1982 plan for the capitalization of AmBell's offer of new CPE. On August 12, 1982, the Common Carrier Bureau sent a request for further information on the CPE capitalization plan and responded affirmatively to AT&T's July 1, 1982 request for confidentiality of certain information that was filed that same date and pertained to AmBell's business plans. On August 26, 1982, AT&T responded to the Bureau's information requests and to the parties' comments. On September 9, 1982, parties filed comments replying to AT&T's August 26 filings.

Parties filing comments include American Satellite Company, New York Department of Public Service, People of the State of California and the Public Utilities Commission of the State of California (California), Computer Business Equipment Manufacturers Association (CBEMA), GTE Service Corporation (GTE), Illinois Commerce Commission, Independent Data Communications Manufacturers Association, Inc. (IDCMA), Kansas Corporation Commission Staff (Kansas), National Association of Regulatory Utility Commissioners (NARUC), North American Telephone Association (NATA) and United Technologies Communications Company (United). See Appendix I for a summary of comments.

standards under which we intend to review AT&T's preoperational expenses for CPE and briefly address various issues related to corporate structure. A subsequent report will address our verification of AT&T's actual compliance with our preoperational expense accounting guidelines and Computer II structural separation requirements.

b. Capitalization

1. Comments

12. AT&T asserts that AmBell's financial requirements will have no detrimental effect on basic services and rates. As support for this assertion, AT&T states that regulated companies will be compensated for their funding of development and formation expenses, and regulatory commissions can set allowed rates of return for basic service operations to reflect the risk associated with those operations. Moreover, AT&T states that its ability to raise capital for basic services will not be harmed because inventors will view with favor AT&T's flexibility in the untariffed provision of new CPE.

13. AT&T believes that the state commissions must accommodate the transactions necessary for AmBell to commence its proposed CPE operations and thereby implement the Commission's Computer II policy. These transactions, in AT&T's view, include the proposed asset transfers at the proposed valuation and the contractual arrangements concerning AmBell's proposed installation and maintenance functions. AT&T indicates that it intends to file with state public utility commissions the applications and other documents required by state law. AT&T, however, fears that prolonged state proceedings or orders inconsistent with the Commission's approval of the capitalization plan would make it impossible for AmBell to offer new CPE on January 1, 1983. AT&T asks that we take whatever action is necessary to ensure the implementation of Computer II goes forward without disruption.

14. The commenting parties claim that the magnitude of the proposed capitalization is greater than is necessary for AmBell to commence operations on January 1, 1983. In addition, the parties argue that AT&T's estimates of the impact upon regulated services of the projected capital infusions to AmBell should have considered the effect of the Modification of Final Judgment (MFJ) into which AT&T and the Department of Justice have entered. *See United States v. Western Electric*, Civil Action No. 74–1698, *slip op.* (D.D.C. August 23, 1982).

15. Many of the parties, including those representing the states, oppose AT&T's proposed asset transfers on the ground that Commission approval of AT&T's plan would constitute preemption of the states' traditional role. The parties believe the states should be free from interference in the exercise of their powers to authorize the manner in which assets are transferred out of regulated service, to identify the impact of the trans-

fers on local service, to select methods for adjusting ratebases upon which local rates would be set, and to review the propriety of a contractual relationship between a utility and an affiliate.

16. In general, the parties suggest that we focus our attention on several areas of concern raised by AT&T's capitalization proposal. First, we are asked to examine whether AT&T should be permitted to capitalize AmBell at the requested level and transfer those assets necessary for commencement of operations as of January 1, 1983. Second, we must ascertain those areas where the FCC must preempt inconsistent state action that would preclude or inhibit the effective implementation of our Computer II policies as of January 1, 1983, and at the same time identify those areas where legitimate state authority may properly be exercised consistent with federal policy. Finally, we must assess whether the imposition of an immediate outside debt and/or equity financing requirement is necessary in order for regulators to adequately separate from AT&T's regulated operations the risk associated with its competitive activities.

2. Funding Level for CPE

17. A threshold issue before us is whether AT&T's instant proposal seeking initial capital assets transfers of $158 million and additional infusions of $4.3 billion for the years 1983–1986 will adversely affect the quality or rates of basic services. If we conclude that no adverse consequences are likely to occur, then AT&T should be permitted to fund AmBell at the proposed level.

18. The funding level for CPE is significantly larger than that required for enhanced services. The magnitude of the dollars involved in supporting the Bell System's detariffed CPE operations must be viewed, however, as a natural consequence of our decision to separate the provision of CPE from common carrier services. If AT&T is to compete in the marketplace for the provision of new CPE, substantial sums of capital are required to fund AmBell's operations. It should come as no surprise that AT&T seeks the level of capital funding for AmBell that it does in light of the scope of its existing CPE operation. In assessing the merits of AT&T's proposal, however, it is important to differentiate between AT&T's total anticipated capital requirements for AmBell through 1986 and the extent to which this level of funding will increase the Bell System's overall capital requirements or otherwise detrimentally affect AT&T's ability to meet the capital requiremnets of its regulated operations.

19. As part of its capitalization proposal, AT&T states that, in addition to specific asset transfers, the aggregate amount of financing (including previously authorized enhanced services funding) during 1983–1986 will amount to about $4.7 billion. AT&T estimates that AmBell will realize net positive funds from operations starting in 1985. It asserts that in 1983, the year of greatest capital infusion in AmBell, there will be no net increase in

Bell System financing. Furthermore, it notes that the shifting of responsibility for CPE provision and installation and maintenance from the BOCs to AmBell will cause the BOC's capital requirements to be less than they otherwise would have been and will not bring about any increase in overall Bell System capital spending.

20. It is clear from the foregoing that AT&T does not seek approval for a capitalization plan that would increase by $5 billion the Bell System's overall financing needs. Because the regulated CPE base will be frozen concurrently with the anticipated commencement of AmBell CPE activities, the BOCs' capital needs will be reduced by elimination of the need to invest in further acquisitions of CPE.[6] As a result, much of the cash flow from embedded CPE operations will be available to support AT&T's financing of AmBell's CPE operations. Consequently, AT&T should experience little pressure to divert either revenues from basic service to new CPE operations or to significantly increase amounts of capital obtained from external sources. To the extent the embedded CPE base is reduced by future action of this Commission in the Computer II *Implementation Proceeding*, CC Docket No. 81–893, this should not significantly alter AT&T's ability to generate the necessary funds to capitalize AmBell. Any increased revenues attributable to the deregulation of embedded CPE can be used to finance AmBell's CPE operations. In the event AmBell's financing needs are greater than anticipated, AT&T's Computer II financial reporting requirements permit us to protect regulated services.[7] Moreover, as discussed below, our authority to set rates for regulated services will assure that AmBell's capital costs will not increase the rates for basic services. Based on the information before us, however, we conclude that no adverse consequences are likely to accrue to ratepayers if AT&T is permitted to capitalize AmBell at the proposed level. Accordingly we will authorize AT&T to capitalize AmBell in the amounts set forth in its proposal.

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[6] The Bell System consolidated balance sheet, December 1981, CR60–No. 2, indicates that the total book value of the two CPE accounts (Account's 231 and 234) increased from $14.1 billion to $15.3 billion during calendar year 1981. This indicates an annual spending level for CPE on the order of $1.3 billion. The amount of this capital that is invested in new CPE will no longer be borne by regulated operations.

[7] Arguably, AT&T's projections of AmBell's financial needs do not anticipate the CPE competition that will be provided by the divested BOCs. Because the Modification of Final Judgment (MFJ) permits the operating companies to begin CPE operations only after transferring all suporting assets to AT&T, the operating companies are unlikely to be a significant competitive force for several years. United States v. Western Electric, Civil Action No. 74–1698, slip. op. at 110–43 (D.D.C. August 11, 1982). Moreover, there is no reason to believe that the impending divestiture will increase risks associated with AmBell financing to regulated operations. Because AT&T will not retain an interest in local exchange operations, AT&T will not have to assume the financial needs of these regulated operations. In addition, AT&T retains all of the CPE operations and the associated cash flow discussed above.

3. Transfer of Specific Assets

21. As part of AT&T's capitalization proposal, it also seeks to transfer to AmBell specific assets that are currently owned by the BOCs. These assets fall into two categories. First, there are those assets that AT&T seeks to transfer as of January 1, 1983 and that AT&T views as essential to AmBell's ability to commence operations as of this date. The second category consists of those BOC assets that AT&T seeks to transfer by July 1, 1984 so that AmBell can provide installation and maintenance of all Bell System business CPE systems including any embedded systems that may be owned by the BOCs or AT&T Long Lines. AT&T's request to transfer specific assets is challenged on the basis that the appropriate state regulatory approval must be obtained prior to any transfer. We shall separately address these two categories of assets and shall address first those assets to be transferred as of January 1, 1983.

22. In its July 1, 1982 capitalization proposal, AT&T has quantified the amount of assets to be transferred as of January 1, 1983 for fifty separate regulatory jurisdictions. See Appendix II. For each regulatory jurisdiction, AT&T has quantified the dollar amounts of assets to be transferred within each of the following categories: buildings/leasehold improvements, furniture and fixtures, computer equipment, motor vehicles, and other work equipment. Subsequent to its filing with this Commission, AT&T filed applications for specific transfers in those jurisdictions where it perceived a statutory obligation to so file.[8] The issue before us is whether individual state regulatory commissions should be permitted to disapprove those asset transfers which AT&T deems necessary for commencement of AmBell's provision of new CPE consistent with our Computer II policies. For the reasons set forth below, we authorize the transfer to AmBell of those assets that AT&T has earmarked for capitalization of AmBell as of January 1, 1983. In so doing, we preempt state action that would preclude the transfer of assets or delay the transfer of assets pending a state determination as to the appropriate transfer value.[9]

23. In Computer II, we established a regulatory scheme under which AT&T would provide CPE on an unregulated basis through a separate subsidiary. This initial determination was made in May, 1980. At that time we established March 1, 1982 as the date for implementing this policy

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[8] AT&T has filed appropriate documents in fourteen jurisdictions. We infer from this that, absent a specific directive from a given state regulatory commission, AT&T need not obtain state approval to transfer assets in the remaining jurisdictions, otherwise it would have sought such approval.

[9] The Commission has authority to preclude state action that would hinder the effectuation of federal policy. See North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977); California v. FCC, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978); New York Telephone Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980).

determination. The March 1, 1982 implementation date was subsequently extended to January 1, 1983. Almost two and one-half years after the initial policy determination was made we are at a stage where the implementation of our deregulatory policy must proceed. In Computer II, AT&T was afforded flexibility as to the structure under which it could market CPE. Whether AT&T elected to market CPE through one subsidiary on a national basis or through a separate subsidiary for each individual BOC was a business judgment within AT&T's discretion to make. AT&T has elected to market new CPE through one subsidiary, AmBell, that will operate nationwide. In making this decision it has formulated a capitalization proposal that will enable AmBell to begin the provision of new CPE by transferring from various BOCs to AmBell a relatively small portion of assets which are currently used for the provision of CPE. The net result is that AT&T has submitted a comprehensive nationwide plan under which AmBell will provide new CPE as of January 1, 1983. Affording each of the more than 50 regulatory jurisdictions the power to disapprove some or all of the assets proposed for transfer by January 1, 1983 would jeopardize AT&T's ability to provide new CPE on a nationwide basis consistent with our Computer II determination. We find that the transactions AT&T proposes for January 1, 1983 operations are essential to the implementation of the Computer II regulatory scheme and state action which would frustrate effective and timely implementation must be preempted.

24. Our decision to preempt is based not only on providing AT&T the ability to market CPE in a reasonable manner on a nationwide basis, but also because the specific assets that AT&T seeks to transfer from the BOCs to AmBell cannot reasonably be construed as necessary for the BOCs' provision of regulated common carrier services. The assets AT&T proposes to transfer as of January 1, 1983 fall into three categories: PhoneCenter Stores, office space, and furniture and fixtures. PhoneCenter Stores are used primarily to provide residential CPE to the public. The office space to be transferred consists of centers for the sale of business CPE and administrative support facilities related to the provision of CPE. The furniture and fixtures relate to the provision of CPE at these locations. It is clear, therefore, that the assets to be transferred as of January 1, 1983 are not necessary for the provision of basic services and our approval of the transfer of these assets will not injure the states' interest in protecting the quality of local exchange services.

25. Finally, as of January 1, 1983, the BOCs will not be providing new CPE. As a result, the total amount of assets that a given BOC currently has devoted to the provision of CPE will not be needed or fully utilized after January 1, 1983. Thus, from a regulatory perspective it would be undesirable if the total level of asset investment in a BOC's CPE operation were to be maintained when the scope of the BOCs' CPE operations is

diminishing. Simply stated, ratepayers should not have to bear the expense for assets no longer necessary for regulated activities. AT&T seeks to remove from the rate base of affiliated carriers those assets that are not necessary for a BOC's provision of embedded CPE, the cost of which should not be borne by ratepayers. There is little question that some assets should be removed from regulated service. While one can disagree as to whether a specific asset should be transferred as opposed to some other asset, it is clear that implementation of our Computer II policies should not be held hostage to such disputes when we are asked to approve a capitalization plan of nationwide scope which appears reasonable and is essential to timely effectuation of our Computer II regulatory scheme.

26. For these reasons we conclude that AT&T should be authorized to transfer those assets necessary for AmBell's provision of new CPE as of January 1, 1983 consistent with the capitalization plan submitted to this Commission. State action inconsistent with this determination is preempted.

27. Given that the BOCs will remove from regulated operations assets that AT&T has identified for transfer as of January 1, 1983, a standard valuation methodology must be used to record the transfer from the BOCs to AmBell. We find it essential to the implementation of Computer II that the assets subject to the proposed January 1, 1983 transfer be valued by a method approved by this Commission. Computer II implementation could be delayed if asset transfers required prior approval of a valuation methodology by each of the regulatory jurisdictions. AT&T seeks to transfer the assets at adjusted net book value. We will approve AT&T's proposed adjusted net book valuation of these assets on an interim basis to assure prompt initiation of AmBell's new CPE offerings. In our Computer II *Implementation Proceeding*, we are currently examining the appropriate valuation methodology to be applied to assets transferred from a carrier's regulated operations. If the valuation methodology chosen in the *Implementation Proceeding* is different from adjusted net book value, AT&T will be required to make retroactive adjustments. While we are prescribing the valuation methodology to be used to established the price at which assets are transferred from the BOCs to AmBell, we are not foreclosing states from using alternative valuation methodologies for state ratemaking purposes. However, state commissions may not condition approval of the January 1, 1983 asset transfers to AmBell on AT&T's use of a different valuation methodology.

28. The second category of assets AT&T seeks to transfer as part of its capitalization plan relates to AT&T's plan to provide installation and maintenance for all Bell System CPE systems through a single AmBell I&M workforce as of July 1, 1984. The Commission provided an 18 month transition period under which BOC personnel could perform installation and maintenance for new CPE. AT&T now intends to have AmBell

provide I&M for embedded and new CPE by the end of this transition period. This necessitates that the requisite assets be transferred from regulated operations to AmBell. AT&T's capitalization plan depicts for each regulatory jurisdiction the amount of assets by category to be transferred to AmBell by July 1, 1984 for installation and maintenance. *See* Appendix II. While we believe that AT&T should be allowed to transfer assets for I&M operations to AmBell, we cannot conclude that unilateral federal action is compelled at this time. Unlike our action with respect to the January 1, 1983 assets, it is appropriate to allow for state scrutiny prior to the transfer of I&M related assets to AmBell.

29. A different approach is warranted for these assets because some of these assets may be important for the provision of common carrier services and CPE. It is not unusual, for example, for the same BOC personnel to handle simultaneously a subscribers telephone service and CPE related needs. Thus, it is reasonable to expect that some assets, e.g. motor vehicles, are currently used in conjunction with the provision of common carrier services and in the provision of CPE.

30. In light of the above, we believe that the states should be afforded an opportunity to assess the effect of AT&T's proposed transfer of I&M assets on local service. At the same time, a mechanism must be established that will enable AT&T to move to a single I&M workforce within the timeframe we have established. In order to effectuate the appropriate regulatory approval for the timely transfer of I&M assets encompassed within AT&T's capitalization plan, we are establishing procedures and timetables for the transfer of these assets. These procedures afford state regulatory commissions adequate opportunity to review the effect of AT&T's proposal on regulated operations within their states without unduly inhibiting AT&T's ability to implement its CPE installation and maintenance operations in a single workforce within AmBell.

31. The following procedures will govern AT&T's transfer of I&M assets to AmBell. First, AT&T must file in each regulatory jurisdiction a list of those I&M assets to be transferred from regulated operations to AmBell. In those states where AT&T has not already filed this information, it must do so no later than January 1, 1983. Second, state or local regulatory commissions will have until September 1, 1983 to disapprove the transfer of any I&M assets to AmBell upon a finding that such assets are necessary for the provision of local exchange service. Third, where no state action is taken by September 1, 1983 to specifically disapprove the transfer of given I&M assets, AT&T will be allowed to transfer I&M assets consistent with its capitalization plan and states will be precluded from taking any contrary action. Further, the valuation methodology to be employed for determining the price at which individual assets are to be transferred to

AmBell shall be determined in our *Implementation Proceeding.*[10] States are not precluded, however, from using a different methodology for state ratemaking purposes.

32. We do not anticipate that state scrutiny will seriously disrupt AT&T's attempts to have AmBell perform installation and maintenance. AT&T may not have to obtain regulatory approval in the majority of states. State scrutiny should be limited to those jurisdictions that have a specific statutory requirement that approval for asset transfers be obtained. In addition, the MFJ requires AT&T to separate all its existing CPE-related activities from the provision of local exchange service. This will involve separating assets used in the provision of local exchange service from assets used to provide installation and maintenance for CPE. AT&T has submitted a capitalization plan which would remove I&M assets from regulated operations. If a state acts to disapprove the transfer, it risks the possibility that ratepayers, at a later date, will bear costs of assets that are not necessary to the provision of local exchange service. A state has no incentive to prevent the transfer of I&M assets unless it is evident that those assets are necessary for the provision of local exchange service. We anticipate substantial agreement between the BOCs and the states in this regard. In the event a state disapproves the transfer of specific assets, AT&T has nine months to make alternative arrangements before the transition period expires.

C. Separation of Risk and Outside Financing

1. Outside Equity

33. In the *Enhanced Services Order*, the Commission considered whether to require outside equity financing. We concluded that the record did not permit a definitive determination on that question. At the same time, we expressed the concern that without some marketplace mechanism such as outside equity financing, we might not be able to separate the risk associated with AmBell's unregulated offerings from the risk of AT&T's regulated services in a rate of return proceeding. Accordingly, the Commission requested that AT&T describe in its CPE capitalization proposal how it would ensure that AmBell unregulated offerings and their associated risk could be separated from the assessment of an allowable rate of return for AT&T's regulated services. *Enhanced Services Order* at 416–17.

34. In response to the Commission's request, AT&T discusses several methods by which it believes the Commission can determine the required return on equity of regulated operations. AT&T first proposes that the

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[10] We anticipate a decision in the *Implementation Proceeding* on valuation methodology prior to September 1, 1983. To the extent AT&T transfers I&M related assets before the Commission acts, it may utilize adjusted net book value on an interim basis pending a Commission determination in the *Implementation Proceeding.*

market data on AT&T common equity be used as a proxy for the cost of equity of regulated operations. AT&T argues that no adjustments to these values will be necessary because initially AmBell's business will be small relative to AT&T's. Further, in the long run, AmBell's cost of common equity will not differ from that of AT&T's cost of common equity for regulated operations. AT&T states that it will assure the similarity of common equity costs for the subsidiary and for regulated operations by offsetting the greater business risk of the subsidiary's operations with a conservative subsidiary capital structure that minimizes financial risk.

35. AT&T next maintains that the return on common equity for regulated operations can be estimated without the use of market data on AT&T common equity by applying one or more of several analytic techniques. AT&T first argues that the risk premium technique is appropriate because regulated entities will continue to independently issue new debt. This will permit us to determine the incremental cost of debt which, in turn, will support estimates of the prospective cost of debt for regulated operations. Second, AT&T suggests that by use of, for example, the discounted cash flow method, the required return on common equity can be determined for companies comparable to AT&T's regulated operations. Third, AT&T states that finance literature supports the use of various forms of the Capital Asset Pricing Model (CAPM) to estimate the required rate of return for a non-traded division of a firm.

36. NATA and United argue that it is unrealistic to expect the differences in business risk between AmBell and AT&T to be mitigated by manipulating AmBell's capital structure. NATA recommends that the Commission initiate an inquiry through which uniform standards could be adopted to determine the proper amount of equity capital costs to be associated with the regulated businesses of AT&T. Commenting parties also argue that use of CAPM to estimate the required rate of return for a non-traded division of a firm cannot be applied to determining AmBell's required return on equity because of the unlikelihood of identifying firms with systematic risk comparable to AmBell's. In general, the parties maintain that the alternative methodologies proposed by AT&T are cumbersome, require extensive Commission oversight, entail inevitable regulatory delay and are suspect due to their widely variant application.

37. In view of these deficiencies, the commenting parties urge that the Commission adopt an outside equity financing requirement as the most expedient means of enabling the Commission to separate the risks associated with AmBell's competitive ventures from those of AT&T's regulated offerings. In addition, parties argue that an appropriate outside equity requirement would (1) increase the opportunity for regulatory scrutiny as a result of SEC reporting and disclosure requirements, (2) lower AT&T's financing requirements (thereby lowering the cost of capital for basic services), (3) deny the subsidiary inclusion in a consolidated tax return

with AT&T, and (4) reduce AT&T's incentives and opportunities to engage in conduct inconsistent with the Commission's requirements.

38. We find that the commenting parties advance the same or similar arguments in support of an outside equity financing requirement that we rejected as inadequate or inconclusive in the *Enhanced Services Order*. The primary issue is whether the Commission will be able to set a fair rate of return for regulated activities by using existing methodologies to distinguish the risk and consequent cost of capital associated with AmBell activities from the risks associated with regulated activities. In large measure, a definitive determination cannot be made at this time as to the Commission's ability to separate risk. It would appear appropriate to ascertain in a concrete situation whether risk associated with AT&T's unregulated enterprises can be reasonably separated from its cost of capital for regulated activities. Absent concrete experience, any conclusion must be based on some degree of speculation. Because the imposition of an outside equity requirement has the effect of reducing AT&T's ownership interest in its unregulated ventures, it should not be imposed if other mechanisms are available to satisfy our objective that AT&T's ownership interest in its unregulated subsidiary not inhibit our ability to set a fair rate of return for regulated operations.

39. We find that the record facts are too speculative to warrant imposition of an outside equity requirement. Instead, we will test AT&T's proposed application of the several methodologies in a future rate of return proceeding. Such a proceeding would provide a specific factual setting, thereby eliminating much of the uncertainty complained of by the parties. If, in the course of such a proceeding, the Commission discovers that it cannot adequately separate the risks of AT&T's regulated and unregulated operations, it can consider at that time whether outside equity is warranted.

2. Outside Debt

40. In the *Enhanced Services Order* at 452, the Commission found that the record was not sufficient to require outside debt financing during AmBell's initial phase of operation. However, we stated that subsequent funding requests would be subject to Commission approval and that outside debt financing could be considered in conjunction with those proposals. AT&T states that AmBell will obtain outside debt financing upon reaching maturity but argues that it would not be advisable to impose such a requirement during the initial stages of AmBell's operations. During the initial stages, AT&T claims, an outside debt financing requirement would unnecessarily interfere with management's prerogatives to conduct financial planning for AmBell. At best, it adds, outside debt would provide only a weak demonstration of AmBell's long run financial viability. This is because charges for interest during the initial period when losses are being experienced would be financed, in effect, by

additional AT&T equity investments in AmBell. Thus, outside lenders would necessarily base their credit evaluations at least partly on AT&T's willingness to invest additional funds in AmBell.

41. United, the only party advocating outside debt, claims that imposing such a requirement would (1) prevent AT&T from borrowing for AmBell on the strength of AT&T's regulated operations, (2) provide a market measure of AmBell's viability, and (3) enable the Commission to determine directly the cost of AmBell's debt capital, thereby facilitating separation of the risks associated with AmBell's competitive ventures from those of AT&T's regulated operations. Even without a long operating history, it argues, a company with $5 billion in assets should experience no difficulty securing outside financing or covering from its operations the cost of interest.

42. We agree that outside debt should not be imposed during the initial stages of AmBell's operations. United's arguments have been addressed in the *Enhanced Services Order* at 417 and been found insufficient to require outside debt. Thus, we conclude that there is no justification for requiring outside debt financing for AmBell at this time. It should be noted, however, that in electing not to require outside debt during the initial stages of AmBell's operation, we attach considerable importance to AT&T's representation that it intends to have AmBell obtain outside debt as soon as practical. In view of these representations, AT&T will bear a heavy burden to demonstrate why additional capitalization should be approved if it has not first obtained outside debt financing. We also reserve the right to require outside debt financing during the time frame of the capitalization plan, if the facts warrant.

D. CPE Preoperational Expense

43. AT&T has reported that by December 31, 1983, AT&T affiliates will have spent approximately $964 million on preoperational activities.[11] These preoperational activities include subsidiary formation and CPE development activities. Our goal is to assure that ratepayers will be reimbursed for funds that they have provided for these activities and for which they are not the beneficiaries.[12] With this order, we complete the first of a two stage effort in attaining that goal. In this stage, we adopt, with certain modifications, the standards that AT&T states it has used in reporting preoperational expenses. We find that those standards, as modified, are reasonably likely to assure that ratepayers will not bear the

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[11] Of the $964 million, Long Lines and the BOCs will have borne approximately $246 million, Western will have borne approximately $500 million dollars and other AT&T entities will have borne approximately $218 million.

[12] CBEMA and NATA maintain that we should require preoperational expenses to be reflected on AmBell's books. We reject that argument as we did in our review of enhanced services preoperational expenses. *See Enhanced Services Order* at 426–27.

costs benefitting AmBell. Next, in our staff review of AT&T documentation, we will determine whether these standards have been properly applied. The results of this second stage will appear in a subsequent report.

44. In order to determine whether AT&T's standards properly protect the ratepayer, we must first determine whether AT&T has properly identified the types of expenses that should be treated as preoperational expenses. Then we must determine whether these preoperational expenses have been properly reported as benefitting AmBell and are subject to reimbursement to ratepayers. Finally, we must address whether AT&T's proposed reimbursement mechanism is appropriate.

1. Identification of Preoperational Expenses

45. We find that, in general, AT&T has properly identified those development expenses to be reported as preoperational expenses. The two types of preoperational activities with which we are here concerned are (1) those that relate to the creation of the subsidiary structure required by Computer II and (2) those that relate to the development of CPE products to be offered by the subsidiary. Subsidiary formation encompasses efforts directly related to setting up the separate subsidiary for the provision of CPE. AT&T's reporting guidelines for formation expenses appear to be reasonably inclusive. The second of these types of activities is CPE development. Here we must determine whether AT&T has been reasonably inclusive in its identification of the types of items and activities for which development expenses must be reported.

46. AT&T has accounted for development expenses not merely for complete, stand-alone products but also for accessories and ancillaries, cost-reducing design modifications, cost-reducing manufacturing techniques, new features, customer design components and subassemblies and equipment or techniques employed in the installation and maintenance of CPE.[13] All these activities should be included as part of CPE. Ratepayers should not fund the development of these items if they are offered by AmBell or support CPE offers by AmBell any more than they should fund AmBell's offer of a complete CPE product. Thus, it is appropriate that AT&T account for these costs as part of development expenses.

47. AT&T has also reported development expenses for system design, testing, final development, project management, pricing, development of

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[13] Responses to Information Requests at I.R. 14, filed August 26, 1982 by AT&T. An example of an accessory or an ancillary is an extension cord. A cost reducing modification can be a less expensive light bulb or integrated circuit. A cost reducing manufacturing technique is a method for reducing the cost of assembling a product. A new feature alters the capability of an existing product. AT&T distinguishes customer design components and subassemblies from "off the shelf" components and subassemblies. AT&T's treatment of these categories will be addressed in a subsequent report based on the staff's ongoing review.

new marketing or sales methods or programs, development of support systems and training programs which would be directly charged to a CPE product.[14] We affirm AT&T's determination that these activities should be reflected within the scope of development expenses. Preparation for the provision of a CPE product is not limited to efforts undertaken in an electronics engineering laboratory to design, test and develop an apparatus or system. CPE cannot fruitfully be designed in the absence of information on functions and features that customers are willing to use and on the prices that they are willing to pay for these. Accordingly, market research efforts must be included in development efforts. Effective preparation for the provision of newly developed CPE may also require the development of support specially designed for such CPE. This may entail the development of new tools, techniques, training, staff organization or staff procedures for the installation and the maintenance of the newly developed CPE. Preparation for the provision of new CPE may also include the development of network equipment and procedures specifically dedicated to the support of such CPE. To the extent AT&T's reporting of the development of support systems and training programs and other efforts captures the expenses associated with these and similar activities, AT&T has properly identified "development" activities.

48. According to AT&T. the collection of development expenses normally begins once a decision is made that the result of a work effort will be offered as CPE and ends with the ability to deliver and support the product to the customer. It also includes work that leads to a decision not to introduce anything as long as the original intent was to develop CPE.[15] Rent expense for employees engaged in these activities is also included. These appear to be reasonable standards for the identification of CPE development activity.

49. Beyond the above expenses, AT&T includes expenses incurred in connection with the installation of equipment or facilities dedicated to specific CPE and tariffed charges for network services used in connection with trials of CPE. This also appears reasonable. Moreover, to the extent that CPE trials were conducted with the use of other network facilities that may not have been available under tariff a fair share of the costs of such equipment should be included among CPE-related preoperational expenses.

2. Expenses Subject to Reimbursement

50. Having accepted AT&T's identification of types of preoperational expenses, we must now determine the extent to which each of these types

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[14] Evidence that AT&T has properly included these types of market research and preparatioin activities is the capitalization plan's inclusion among CPE engineering efforts of the marketing and operations activities related to the development of new CPE. *CPE Capitalization Plan* at 4.

[15] AT&T also states that an "appropriate allocation of research expenses will be added to the reimbursement . . ." *CPE Capitalization Plan* at 11. This should include a basic research loading as we required in the *Enhanced Services Order* at 422–3.

of expense must be reported as attributable to or benefitting AmBell and subject to reimbursement to regulated service. Because our goal is to assure that ratepayers will be reimbursed for funds they have provided for AmBell formation expenses and development expenses, AT&T must report the types of expenses identified above to the extent they benefit AmBell. Because formation expenses, by definition, benefit AmBell, all such expenses must be reported regardless of the date of incurrence or the identity of the affiliate that incurred the expenses.

51. Attribution to AmBell of the benefit of CPE development expenses can be determined on a different basis for each of three different groups of CPE: (1) types of CPE that have been offered under tariff and will not be offered by AmBell; (2) types of CPE that will be first introduced by AmBell and will not have been offered under tariff and; (3) types of CPE that will have been offered under tariff and will also be offered by AmBell. As to the first group, we will not require the reporting of development expense for types of CPE that will not be offered by AmBell because these expenses will benefit only the ratepayer, not AmBell. As to the second group, development expenses for CPE that will receive its initial introduction by AmBell clearly benefits only AmBell. AT&T states that it has reported all such expenses regardless of the date of incurrence or the identity of the affiliate that incurred the expenses. Development expenses of the third group are the most difficult to attribute. Because a given type of CPE, in the course of its market life, may be offered on both a regulated and unregulated basis, its development expense will benefit both regulated services and AmBell. Accordingly, we must determine how to fairly apportion between regulated affiliates and AmBell the development expenses of this group of CPE.

52. AT&T states that it has reported all CPE Engineering Design and Development (ED&D) expenses incurred by BTL after May 2, 1980, the release date of the Computer II *Final Decision*. NATA suggests that CPE development expenses benefitting AmBell should be identified by using an amortization approach based on the assumption that most research and development costs have a useful market life of seven years. NATA's approach, however, has difficulties. First, NATA does not demonstrate the usefulness or accuracy of the seven year period. Second, to go back seven years to determine total CPE development costs will require time consuming and costly review of voluminous, dated documents. In contrast, AT&T's approach for reporting BTL expenses is far simpler and more readily auditable. Moreover, it probably achieves as much precision and fairness as NATA's method.

53. AT&T's use of the date of the *Final Decision* as the beginning of the period for which BTL CPE expenses should be deemed as benefitting AmBell is reasonable, especially when viewed in light of other alternatives that involve enormous accounting efforts to reconstruct how such

expenses should be allocated. Moreover, we believe that where it is difficult to assign the benefits of given development efforts it would be inappropriate to require AT&T to report expenses for such efforts if they were incurred prior to the date AT&T knew that it may be required to reimburse regulated entities for their funding of CPE development efforts. Accordingly, for types of CPE offered both under tariff and by AmBell, we will not require AT&T to report development expenses incurred prior to May 2, 1980, the release date of the Computer II *Final Decision*. Furthermore, given the long lead time in developing most CPE, use of the May 2, 1980 date will capture only expenses related to those products which will be marketed primarily by AmBell.

54. In contrast with its treatment of BTL, AT&T takes a different approach for development costs incurred by AT&T, Western and the BOCs. AT&T includes within preoperational expense, developmental expenses incurred for any CPE that will be introduced in 1982 and thus includes among preoperational expense reports all development expenses incurred for such CPE regardless of the date of incurrence and the identity of the incurring entity.[16] This appears reasonable and serves to protect ratepayers from the possibility that the introduction of new CPE could be timed solely for the purpose of incurring narrower preoperational expense reporting requirements. We find, however, that AT&T should also account for expenses incurred by these entities after the *Final Decision* that directly relate to post May 2, 1980 BTL activities that AT&T has included within preoperational expenses. To the extent there is cooperation between BTL and affiliated entities with respect to the development of specific CPE products, expenses incurred by affiliates in the development of such products must be accounted for in the same manner as AT&T proposed for BTL. There is no reason to treat development expense incurred by Western, Long Lines or the BOCs in a manner different from that afforded development expenses incurred by BTL. The net result is that these entities will have to account for those CPE-related activities, if any, for which expenses were incurred between May 2, 1980 and January 1, 1982 and which relate to BTL development efforts.

55. Finally, we note that under our bifurcated approach to deregulating CPE, AT&T has some discretion as to whether to treat recently manufactured CPE as "embedded" CPE or "new" CPE. In the few months prior to January 1, 1983, AT&T will be manufacturing and shipping to customers CPE, including many sophisticated business CPE systems. AT&T may elect to treat these as new CPE by never having accounted for such CPE

[16] AT&T does not explicitly mention Long Lines. We will assume that AT&T intends to treat Long Lines' contributions to preoperational expenses in the same manner as it treats the BOCs contributions to preoperational expenses.

on the books of the BOCs or Long Lines.[17] There may be legitimate business reasons for doing this. For example, if total installation of a complex business system spans a couple of months, to avoid a part of a system being treated as embedded CPE and part as new CPE, AT&T may decide to treat the whole system as new. It may do this by never having the equipment reflected on the books of affiliated carriers. We conclude that the following guidelines should apply to new CPE that is manufactured, and marketed by sale or lease prior to January 1, 1983. AT&T should separately account for the following expenses incurred during the last quarter of 1982: (a) direct sales expense; (b) installation and maintenance expenses; and (c) product specific advertising. These expenses are subject to reimbursement. Adherence to these guidelines will protect ratepayers from bearing unwarranted costs as AT&T makes its operational transition to the provision of new CPE through AmBell.

3. Method of Reimbursement to Ratepayers

56. As noted above, AT&T estimates that Long Lines and the BOCs will have funded approximately $246 million of preoperational expenses by the end of 1982. AT&T proposes to reverse the accounting entries originally made and then present the appropriate amounts subject to reimbursement to federal or state regulatory authorities in the course of the appropriate ratemaking proceedings.

57. For the reasons AT&T has advanced, we now adopt for both enhanced services and CPE preoperational expenses AT&T's proposal to the extent that it suggests that accounting entries should be reversed. However, because AT&T's proposal would not reflect on its books the amounts owed to ratepayers for reimbursement of preoperational expenses, we believe its accounting corrections are not sufficient to accurately reflect the financial posture of AT&T's regulated affiliates. We shall therefore require AT&T to reflect the appropriate amounts due to ratepayers as a liability on the books of its regulated affiliates. In addition, to ensure that ratepayers actually receive the amounts they provided for preoperational expenses, we require special reporting to state and federal regulatory authorities. We also require AT&T to demonstrate why it should not reimburse ratepayers for the approximately $500 million of Western-funded preoperational expenses.

a. Long Lines and the BOCs

58. AT&T intends to reimburse regulated affiliates for the total amount of CPE preoperational expenses funded by them. To do so, AT&T proposes to treat the amounts as delayed items under § 31.01–5 of our rules and will reverse the accounting entries originally made when expenses were incurred. Thereafter, AT&T intends to present the amounts ap-

[17] It may not treat as new CPE equipment which is considered embedded equipment, i.e., that CPE included in regulated accounts or subject to the jurisdictional separations process.

plicable to the various state jurisdictions for ratemaking treatment. The amounts funded by interstate ratepayers will be presented to us for decision. This approach is virtually identical to AT&T's approach outlined in its Petition for Reconsideration of the *Enhanced Services Order*.

59. The issues involved with reimbursing ratepayers for CPE preoperational expenses that they funded are in all significant respects the same as those we faced in the *Enhanced Services Order*. The approach AT&T has proposed differs from that which we mandated in the *Enhanced Services Order*. There, we required AT&T to increase the cross-bar plant depreciation reserves (account 171.221 cross-bar) of the BOCs and Long Lines in the full amount of reported enhanced services preoperational expenses for regulated affiliates. The increased reserve would have resulted in a reduced ratebase, thereby leading to reduced tariff rates paid by ratepayers.

60. In its Petition for Reconsideration of the *Enhanced Services Order*, AT&T alleged certain infirmities in effecting this reimbursement by increasing the cross-bar depreciation reserve. First, it contended that our *Order* required AT&T to violate the Uniform System of Accounts (USOA) and generally accepted accounting principles (GAAP). Second, it argued that our method distorted the amounts to be reimbursed to different classes of ratepayers because the separations method used to allocate the cross-bar account between the interstate and intrastate jurisdictions was different from those used to allocate the expense accounts in which preoperational expenses were originally entered. Third, AT&T contended that state ratepayers had not borne all reported enhanced services preoperational expenses and that some of those expenses were encluded from ratemaking test years. AT&T suggested that expenses may have been excluded because (1) they were specifically disallowed, (2) there was a limit placed on license contract expense includable in a test year, or (3) they did not occur in a test year. Fourth, AT&T asserted that the ratemaking commission which originally permitted expenses to be included in revenue requirements is the best entity to oversee the reimbursement.

61. AT&T has raised some troublesome problems. In particular, AT&T is correct that the separations process employed to allocate the cross-bar switching account between interstate and intrastate jurisdictions is different from the method applicable to the expense accounts (primarily license contract expense) originally charged. The cross-bar account is allocated on the basis of relative minutes of use, Separations Manual, §51.3, whereas license contract expense is allocated on the same basis as the underlying expenses which comprise the license contract charge. *Id.* § 48.5. Using a reimbursement method that relies upon a separations procedure different than those through which preoperational expenses were originally allocated distributes incorrectly the relative amounts of

payments between jurisdictions, among companies and ultimately among subscribers. As a result, the class of ratepayers who paid for preoperational expenses would not be reimbursed in the same proportionate amounts as they originally paid.

62. In addition, distortions between interstate and intrastate jurisdictions would occur if, as AT&T contends, amounts were disallowed from state ratemaking treatment. The reimbursement method outlined in the *Enhanced Services Order* would entitle a ratepayer to reimbursement even if he or she did not pay for those expenses. AT&T's proposal to reverse the accounting entries originally made when peroperational expenses were charged to regulated affiliates would lessen distortions in the relative amounts to be reimbursed to different classes of ratepayers. Because the reimbursement method established in the *Enhanced Services Order* would lead to distortions in the proper allocation of the reimbursement funds between interstate and intrastate jurisdictions we grant AT&T's Petition for Reconsideration of the *Enhanced Services Order* subject to the requirements outlined herein.[18]

63. We agree with AT&T that it should follow the dictates of 47 C.F.R. § 31.01–5,[19] which governs the correction of items which relate to noncurrent accounts. To the extent that preoperational expenses were charged to operating expense accounts, AT&T should credit the expense accounts originally charged and should charge account 323 "Miscellaneous income charges" to reflect the expenses as "below-the-line" expenses. Also, AT&T should refund these same expenses to the BOCs and Long Lines in cash, with a contra charge to account 525, "License contract revenues," the revenue account originally credited where Long Lines or the BOCs paid AT&T for the expenses. The BOCs and Long Lines should record the refund from AT&T through a debit to cash and a credit to the account originally charged on their books, e.g., account 674 "License contract expense" or the equivalent Long Lines account.

64. Those accounting entries, however, do not go far enough. Reversing the accounting entries effectively reimburses the BOCs and Long Lines for the preoperational expenses contained in their operating expense accounts. Yet, the true financial posture of those companies has not been

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[18] In making this decision we have fully considered California's Opposition and AT&T's Reply thereto. No other pleadings were filed with respect to AT&T's Petition for Reconsideration.

[19] *See* 47 C.F.R. § 31.01–5, which reads in relevant part:

> (a) The term "delayed items" means items which are accounted for in the current accounts with respect to transactions which occurred before the current calendar year. . . .
>
> (b) Unless the inclusion of a delayed item in the current accounts would seriously distort those accounts, it shall be included in the same account in the current year that would have been credited or charged if the item had not been delayed. If the delayed item would seriously distort the current accounts, it shall be credited to account 365, "Delayed income credits." . . .

recorded on their books of account. As with any outstanding sum of money owing to a third party, GAAP normally requires[20] a company to set up such a debt in a liability account. We agree with AT&T that GAAP should be followed whenever possible. Therefore, to record the fact that monies are owed to ratepayers, the debt should be reflected in a liability account until that debt is paid, i.e., reflected in adjusted tariff rates. The appropriate USOA account to record this debt is account 174, "Other deferred credits."

65. There is, however, an additional problem. AT&T states in its Petition for Reconsideration of the Enhanced Services Order that some reported enhanced services preoperational expenses were not included in state ratemaking test year, thereby preventing ratepayers from bearing these expenses. AT&T argues that ratepayers should not be reimbursed for monies they never provided in the first instance. We agree. Nevertheless, because reflecting the appropriate reimbursement amounts in a liability account is necessary to comport with sound accounting principles, we must determine what amounts should be placed in account 174 prior to the time these reimbursement amounts are treated in ratemaking proceedings. If a substantial amount of preoperational expenses have not been paid for by ratepayers in a particular jurisdiction then it would be inaccurate to reflect reported preoperational expense amounts as a liability in account 174. On the other hand, where all or most of the reported preoperational expenses have been paid for by state ratepayers in a particular jurisdiction, it would be necessary and appropriate to include such amounts in account 174. By requiring that such amounts be reflected or not reflected as a liability on regulated company books we are not determining for state ratemakers the amount of the refund to be returned to ratepayers or the method by which such a reimbursement should be conducted. Rather, we are simply requiring AT&T to reflect as accurately as possible the true financial posture of the BOCs and Long Lines, deferring to state commissions as to the ratemaking treatment to be afforded the reimbursement amounts.

66. We note that AT&T asserts that 80 percent of enhanced services preoperational expenses were borne by interstate services. Petition for Reconsideration at 11. AT&T does not argue that any enhanced services preoperational expenses were excluded from interstate ratemaking treatment. AT&T contends that some 60 percent of CPE preoperational expenses were borne by interstate operations. *See* Letter from William R. Stump to Chief, Common Carrier Bureau, Attachment B (October 1, 1982). AT&T also does not argue that any CPE preoperational expenses

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[20] Accounting Principles Board Statement No. 4, ch. 7 reads in part: "Liabilities are recorded when obligations to transfer assets or provide services in the future are incurred in exchanges." AICPA, *Professional Standards*, A.C. § 1027.07.

were not borne by interstate ratepayers. *See* Supp. Cap. Plan at 11 & n.**. Therefore, the full amount of interstate CPE and enhanced services preoperational expenses should be reflected in Long Lines account 174, with a contra change to the appropriate operating revenue accounts, or in the alternative, account 526, "Other operating revenues."

67. So that an evaluation of the appropriateness of the amounts to be placed in BOC deferred accounts 174 for intrastate ratemaking can be made, within thirty days after the final CPE preoperational expense report is filed with this Commission, AT&T shall report to the Chief, Common Carrier Bureau, the full amount of reported preoperational expenses allocated to each ratemaking jurisdiction, both state and federal, and demonstrate the basis upon which such an allocation is made. Furthermore, within ten days of the release of this order AT&T shall file with the Chief, Common Carrier Bureau, its report which allocates the full reported amounts of enhanced services preoperational expenses to each ratemaking jurisdiction, demonstrating the basis upon which it allocates the reported amounts among the various jurisdictions. We require AT&T also to report: (1) the amounts for each state jurisdiction AT&T believes were excluded from ratemaking treatment, (2) the reason such amounts were excluded, and (3) the amount which AT&T believes should be included in account 174 with respect to each state jurisdiction. We hereby delegate to the Chief, Common Carrier Bureau, the duty to evaluate the sufficiency of those AT&T reports. If the Bureau Chief finds that AT&T's information is insufficient or if he finds no substantial disallowance of those expenses has been made, the Chief is authorized to require the full amount of reported preoperational expenses to be entered as a credit in BOC accounts 174 "Other deferred credits," with a contra charge to account 526 "Other operating revenues."[21] Account 174 will be cleared from the books once ratemaking treatment has been afforded those amounts as part of the reimbursement process or where a commission has decided no reimbursement is required.

68. To effect the reimbursement to interstate ratepayers, the full amount allocated to the interstate jurisdiction shall be used to reduce the federal revenue requirement in the next interstate ratemaking or rate equalization proceeding. By this approach we intend that the full amount of interstate preoperational expenses shall be recovered by ratepayers. AT&T shall report to the Chief, Common Carrier Bureau, how it proposes to spread the reduction of the revenue requirement among the interstate tariffed services. We hereby delegate to the Chief, Common Carrier Bureau, the duty to decide whether AT&T's proposal is adequate or whether another mechanism shall be employed.

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[21] AT&T has filed some of this information with the Bureau Chief; however, it is incomplete. AT&T need not refile information it has already filed.

69. To facilitate state commission review, AT&T shall file with each state commission at the same time it files with us a copy of the report detailing the full amount of reported preoperational expenses allocated to each ratemaking jurisdiction and the alleged exclusions therefrom. In addition, in conjunction with the first ratemaking proceeding following the reimbursement to regulated affiliates, the appropriate BOC shall present the allocated preoperational expenses again to each state commission for ratemaking scrutiny. Reflecting the amounts in liability account 174 will also highlight the reimbursement for state ratemakers. In this way, there will be a greater assurance that actual ratemaking scrutiny will be given the reimbursement amounts.

70. The requirements outlined herein are superior both to those which AT&T has proposed and to the method we established in the *Enhanced Services Order*. In the *Enhanced Services Order* we began with the proposition that ratepayers should be reimbursed for those funds they provided to finance the preoperational activities of AmBell, a competitive venture. 90 FCC 2d at 424–25. The principal reason we rejected AT&T's original proposal to simply reverse the accounting entries originally made was that there were inadequate assurances that ratepayers would be refunded their appropriate share of expenses. *Id.* By outlining the federal reimbursement mechanism to be used, by requiring AT&T to reflect reimbursable amounts as liabilities on BOC and Long Lines books and by requiring special reporting to state commissions, an adequate mechanism has been established to assure that an actual and accurate ratepayer reimbursement will occur.

71. In addition to assuring ratemaking scrutiny of these reimbursement amounts, the plan we have outlined in this order enjoys the added advantage of providing flexibility to states to effect the reimbursement in the manner they deem the most appropriate given the circumstances in their states. State flexibility is a goal which AT&T argues for in its Petition.

72. Furthermore, we agree with AT&T that states should have the flexibility to determine the amount of the actual reimbursement that will be given ratepayers in their jurisdictions. For instance, preoperational expenses that were included in a state revenue requirement would be reflected in rates during every year in which such rate is in effect. In order to recompense ratepayers for the repeated payment of those rates which reflected preoperational expenses, a higher reimbursement amount might be appropriate. On the other hand, in a particular state, a ratemaker may have specifically disallowed or excluded some preoperational expenses from inclusion in a ratemaking test year. This may possibly require a reduction in the reimbursement. Because state ratemakers, and not this Commission, possess the facts upon which to evaluate any argument to increase or decrease the reported reimbursement amounts, state

commissions are in a better position than we are to determine the method and amount of reimbursement to intrastate ratepayers.

73. Moreover, the accounting entries AT&T has proposed to make and our requirement that reimbursable amounts be reflected in account 174 on regulated affiliate books more fully complies with the USOA and GAAP. AT&T's proposal correctly follows the dictates of § 31.01–5 of our Rules relating to correcting misstated amounts in past year accounts. In addition, our requirement that reimbursable amounts be reflected in account 174 creates an accurate reflection of the true financial posture of the companies by recording the liability to ratepayers on their books until ratemaking scrutiny has been afforded those amounts. Of course, if AT&T demonstrates that substantial amounts have been disallowed by particular state commissions, no amount will be entered in the appropriate BOCs' account 174 for that jurisdiction, for to do so would inaccurately reflect the liability owed by that company.

74. Finally, by adopting AT&T's accounting proposals, a more accurate refund will be distributed among classes of ratepayers. That is so because the same separations methods that were used to allocate the expense accounts originally charged between interstate and intrastate jurisdictions will be used to separate the reimbursement amounts. Because the allocative factors used in the separations process necessarily change from year to year, the reimbursement will not exactly return the same money to the identical ratepayers who provided the funds originally. Nevertheless, the reimbursement will be more accurate than it would be by increasing the cross-bar depreciation reserve as we required in the *Enhanced Services Order*. Thus, we find the plan we have outlined herein to be the best method in these circumstances to accurately reimburse ratepayers.

b. Western Electric

75. As stated above, AT&T states that Western will have funded approximately $500 million of CPE preoperational expenses by the end of 1982. It does not intend to reimburse ratepayers for any portion of Western-funded expenses. In our *Enhanced Services Order* we approved AT&T's proposal to reimburse Western for enhanced services preoperational expenses funded by Western. Western would then use those funds to reduce central office switching equipment prices. *Enhanced Services Order*, 90 FCC 2d at 426–27.

76. In CC Docket 19129, we directed Western to price CPE sold to the BOCs on the basis of the same rate of return we allow regulated entities to earn. We stated that, if prices reflected a rate of return in excess of the allowable rate on an average basis over a five year period, disallowances with respect to regulated affiliate revenue requirements might be required. *Charges for Interstate Telephone Services, Phase II Final Decision*, 64 FCC 2d 1, 80 (1977), *recon.*, 67 FCC 2d 1429 (1978). CPE

preoperational expenses were included in Western's costs that make up its theoretical revenue requirement to accomplish that rate of return. If those preoperational expenses had not been included in the price Western had been entitled to charge, the prices to the BOCs would have been lower. Without those preoperational costs, Western may have earned in excess of the allowable rate of return.

77. Therefore, it is possible that regulated entities paid too high a price for the CPE they purchased from Western by the amount of improperly included preoperational expenses. It is also possible that this overpayment was passed on to ratepayers in the form of an inflated ratebase and increased depreciation expenses. If ratepayers paid for those expenses, then a ratepayer reimbursement is required. Because those equipment prices form the basis of the asset value to be allocated between the intrastate and interstate jurisdictions in the separations process, we have an interest in examining Western-funded preoperational expenses to the extent that interstate ratepayers may have paid for some of these Western-funded expenses.

78. We cannot be certain, however, that ratepayers actually paid the increased Western prices caused by the inclusion of CPE preoperational expenses or that ratepayers are otherwise entitled to a reimbursement. For example, certain state commissions may not have permitted the full price for CPE charged by Western to be reflected in BOC CPE plant accounts.

79. AT&T has stated that it does not intend to reimburse either Western or ratepayers for funds Western provided to finance CPE preoperational activities. AT&T Response to Information Request 15. AT&T has identified four reasons why a ratepayer reimbursement is inappropriate in these circumstances. *Id.* First, AT&T contended that, as a "develop-and-then-produce-and-sell" business, Western, and American Bell after January 1, 1983, will finance current research and development related to future products through current equipment sales. Therefore, AT&T concluded, there is no reason to reimburse any of these expenses because AmBell will simply assume Western's ongoing CPE development business. We have difficulty in understanding AT&T's contention here. AT&T admits that development costs are expensed in the year incurred. Therefore, AT&T also implicity admits that those costs are included in the price of products sold to BOCs. At least some of those development expenses were thus theoretically paid for by ratepayers through the form of an inflated ratebase and increased depreciation expenses.

80. Second, AT&T argued that Western's prices would have been the same even if CPE preoperational expenses had not been incurred and included in equipment prices. Here again we have difficulty in understanding the point of AT&T's assertion. To the extent that such an assertion implies that AT&T is ignoring the dictates of Docket 19129,

which prohibits Western from pricing its CPE products at a level designed to earn more than regulated companies' allowed rate of return, it must be rejected.

81. Third, AT&T argued that enhanced services development costs funded by Western should be treated differently from CPE development costs. AT&T argued that AIS/Net 1000 was a service of new vintage, making it improper for regulated customers to pay for costs associated with an unregulated offering. AT&T distinguished CPE because CPE is not of new vintage and because those development costs were borne by CPE users in the past and will be borne by them in the future. Thus, concluded AT&T, basic services ratepayers have not borne the cost of new CPE development. This argument is incorrect. CPE users paid for past CPE development costs by paying tariffs for receiving basic services. Therefore, development expenses with respect to deregulated products should not be paid for by basic service ratepayers, just as with enhanced services preoperational expenses. Furthermore, it is likely that much of CPE development expense related to CPE was never offered under tariff. AT&T's distinction between AIS/Net 1000 and new CPE, therefore, appears to be unsound.

82. Fourth, AT&T contended that development costs contained in equipment prices for products sold to the BOCs are capitalized on BOC books. Therefore, AT&T concluded, once the embedded base is transferred out of regulated service, the undepreciated portion of development cost will no longer be paid for by ratepayers. AT&T's contention misses the point. We are here not concerned with the recovery of expenses for that CPE delivered to the BOCs, but only with the recovery of expenses for CPE delivered to AmBell or its customers.

83. At this point we find AT&T's arguments with respect to its proposal not to reimburse ratepayers for any portion of Western-funded CPE preoperational expenses to be unpersuasive. Nevertheless, there are insufficient facts on the present record to conclude whether a reimbursement is in fact warranted. Therefore, within 30 days after the release of this order, we require AT&T to further demonstrate whether Western-funded CPE preoperational expenses should be reimbursed in whole or in part to ratepayers. We direct that AT&T demonstrate the basis on which Western pricing comports with the dictates of Docket 19129. AT&T should also explain why CPE preoperational expenses were not included in prices BOCs paid for Western CPE or in rates paid by ratepayers. In addition, AT&T should state whether and to what extent any state may have disallowed any part of Western prices from BOC revenue requirements. Furthermore, AT&T shall describe in detail any other reason why ratepayers did not bear these expenses or any other reason why ratepayers should not be reimbursed for Western-funded CPE preoperational expenses.

84. Because of the importance of the present question and because of the large amount of money involved, we believe it is in the public interest to solicit public comments on this matter. Therefore, within 30 days after the date AT&T files as described herein, interested parties may comment with respect to AT&T's filing. AT&T will then be afforded 15 days to reply to those comments. Thereafter, the Commission will decide whether a ratepayer reimbursement is required on account of Western-funded CPE preoperational expenses.

E. Structural Separation

85. AmBell's board of directors is comprised of officers and employees of the Bell system. AmBell's organization consists of a chief executive officer, a headquarters staff, an engineering design and development staff, a business systems division and a consumer products division. The chief executive officer is a member of the board of directors and is responsible to the board for the operations and financial performance of the subsidiary. No officer or employee of the subsidiary will simultaneously be an officer or employee of AT&T or any other affiliate.

86. AT&T proposes that AmBell obtain administrative support services from AT&T General Departments, the 195 Broadway Corporation, the Administrative Services Division, Long Lines, BTL and the BOCs in accordance with AT&T's January 13, 1982 report and subsequent filings. Provision of these and other administrative services proposed by AT&T have been addressed by our June 16, 1982 order, 90 FCC 2d 184, and will be addressed further in another Commission order.

87. In addition to administrative support services, BTL will provide engineering, design and development for hardware and software relating to the subsidiary's enhanced services and CPE. AT&T projects that by 1985, all of AmBell's engineering, design and development personnel located at several BTL facilities in New Jersey will be relocated to AmBell's planned main development facility. Until that time, BTL will provide AmBell space and associated building and support services at BTL facilities on a cost compensatory basis. AT&T claims that strict control mechanisms will prevent prohibited information flow.

88. AT&T states that Western will manufacture products and provide engineering, design and development services for the subsidiary at compensatory prices. Western may also distribute, install and repair the products it sells to the subsidiary and license its technology to the subsidiary. AmBell personnel will be located at Western manufacturing plants in order to consult with Western's manufacturing engineers and production personnel. AmBell personnel at two Western plants will be involved in software development. These AmBell personnel will receive building and support services from Western.

89. AT&T states that it intends to achieve compliance with Computer II separation requirements by using such mechanisms as information flow

controls, employee education programs and employee transfer monitoring programs, as well as policies and procedures concerning the disclosure of AT&T's proprietary customer and network information. These matters will be discussed in a subsequent order.

90. Based on the information currently before us, AT&T's plans for the structure and operations of AmBell appear consistent with Computer II policies. However, the Commission's staff intends to review AT&T's implementation of these plans to assure AT&T's adherence to Computer II. The following discussion is provided as guidance to AT&T and to assist the staff in its review.

91. AT&T states that Teletype Corporation, a wholly-owned, unseparated subsidiary of Western, will continue to market CPE to end users after January 1, 1983. In addition, AT&T may later seek to provide new CPE through affiliated BOCs in certain limited cases, such as provision of special CPE to the hearing disabled. IDCMA states that Computer II does not permit marketing of new CPE to end users by unseparated AT&T affiliates and fears that AT&T may be attempting to create an open-ended exception to the separation requirements.

92. We find no basis for concluding that AT&T intends to engage in prohibited marketing of new CPE after January 1, 1983. The Commission has expressly permitted Western and Teletype to market CPE to foreign buyers, non-Bell equipment manufacturers and non-Bell suppliers of CPE and to the federal government. *Further Reconsideration* at 544. Of course, if Western, Teletype or any other unseparated affiliate provides CPE to domestic end users, it must do so through a separate subsidiary structure. *Id.*[22] None of AT&T's filings indicate that it plans to market new CPE through the BOCs or other unseparated affiliates in violation of our separation requirements.

93. AT&T states that until AmBell technical employees can be transferred to AmBell's own facilities in 1985, BTL will provide AmBell building space in which BTL employees also will be located. AmBell will also share BTL computer facilities until July, 1983. However, AT&T states that it will institute information flow controls in the shared facilities to assure that AmBell and BTL employees will not have access to the data bases of the other entity. CBEMA professes to recognize the transitional difficulties that AT&T faces but believes that AT&T should report to the Commission on employee relocations. AT&T indicates that it would be

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[22] The question of the applicability of the Computer II separation requirements to Southern New England Telephone Company and Cincinnati Bell, Inc. is currently the subject of another proceeding. Motion of Southern New England Bell Telephone Company for Declaratory Ruling, 90 FCC 2d 233 (1982). On October 22, 1982, AT&T filed a petition for waiver of Computer II requirements with respect to the provision of CPE to meet the special needs of disabled persons. Following receipt and analysis of comments and reply comments, we will address of AT&T's petition.

willing to report on employee relocations and associated costs. IDCMA opposes all sharing of physical space by AmBell and BTL.

94. AmBell's transitional sharing appears consistent with the intent of Computer II. In the *Reconsideration* at 81, the Commission permitted joint research and development except that the separate subsidiary must develop its own applications software. AmBell is also precluded from obtaining access to proprietary customer and network information that is not equally available to AmBell competitors. *See Final Decision* at 479–80; *Reconsideration* at 81; Section 64.702(c)(4) of the Rules. Because AT&T has stated its intention to end AmBell's sharing of computers and space with BTL by July, 1983 and 1985, respectively, we will permit the sharing on the condition that AT&T has in place adequate information flow controls. AT&T should also file with the Chief of the Common Carrier Bureau, commencing by January 1, 1983, semi-annual reports on AmBell and BTL employee relocation including status, milestones and associated costs.

95. AT&T also intends to permanently locate AmBell software development personnel in two Western manufacturing facilities in order to assure efficient manufacture and to produce accurate operating and maintenance documentation. AT&T claims that because the work at these two plants relates to CPE, there is little risk of improper access to proprietary network or customer information. AT&T also states that AmBell personnel will conduct no joint non-generic software development for AmBell products or services.

96. As stated above, AmBell must develop its own applications software. This requires that AmBell applications software development be conducted separately in AmBell's own facilities. AT&T's statements do not indicate that the AmBell employees located at the two Western plants will develop applications software.[23] In addition, its statements indicate that, because the products of these plants are CPE, there is little danger of proprietary information flow or cross-subsidy at these Western locations. Commission staff can verify these matters in its review. Accordingly, we will permit AT&T's proposed location of AmBell employees in Western facilities.

97. AT&T states that Western may distribute, install and repair the products it sells to AmBell. IDCMA argues that Western's provision of distribution services to AmBell violates the Computer II prohibition of joint marketing. However, the Commission has previously stated that the separate subsidiary may obtain installation and maintenance services for

[23] AmBell employees may also be located at other Western plants for inspection and quality assurance purposes. To the extent these employees are not engaged in applications software development such colocation is permissable.

equipment it purchases from an unseparated manufacturing affiliate. *Final Decision* at 477; *Reconsideration* at 81. Because Computer II permits Western to manufacture equipment for AmBell and install and maintain that equipment for AmBell, we see no purpose in requiring AmBell to arrange for the intermediate step of delivery of Western-manufactured equipment from Western facilities to AmBell's customers' locations. Accordingly, we find that Computer II does not preclude AT&T's plans for Western's distribution, installation and repair of products it sells to AmBell.

98. The BOCs, according to AT&T, are providing AmBell with services concerning the transfer of physical space to AmBell which, despite diligent effort, may not be completed by January 1, 1983. In addition, AT&T states, BOC and AmBell personnel will not be completely separated by that date. In view of AT&T's assurances that the transitional sharing of services and space will be brief, we will permit such sharing, if by December 1, 1982, AT&T files with the Chief of the Common Carrier Bureau a report describing the specific sharing arrangements and stating timetables for the termination of such sharing.

99. In general, AT&T states that all the above systems, facilities and services will be provided to AmBell on a cost compensatory basis. The parties argue that BTL and Western accounting systems are inadequate to determine whether the charges to AmBell in fact will be compensatory. However, Computer II does not require approval of BTL's or Western's accounting systems as a condition to the provision of support to AmBell. Of course, AT&T is required to file with the Commission separate contracts for each activity in which AmBell engages with other AT&T affiliates.

100. AT&T states that the CPE capitalization plan purposes no transfer of patents to AmBell, although patents will be licensed to it on reasonable terms and conditions. IDCMA states that AT&T should be required to specify whether, in the future, AT&T or any of its affiliates will transfer any patents to AmBell, and, if so, how they will be valued. IDCMA also argues that AT&T should be required to describe the terms and conditions of patent licensing to AmBell and whether the licenses will be exclusive. Currently, the License Contract provides the terms under which patent licenses are provided to AT&T affiliates. In our license contract proceeding, CC Docket No. 80–742, the terms of the license contract and similar arrangements are under consideration and will not be addressed here.

IV. Conclusion

101. Our review of AT&T's supplemental capitalization plan is being conducted in two stages. Here we address those issues necessary for AT&T's provision of new CPE on a nontariffed basis as of January 1, 1983.

The second phase of our review consists of monitoring AT&T's accounting for preoperational CPE expenses and compliance with structural separation requirements. This latter phase is ongoing and will be addressed in a subsequent report.

102. In assesseing AT&T's supplemental capitalization proposal, we have approved the level of funding requested and have concluded that it will not adversely affect the quality or rates of basic services. In so doing, we have approved the transfer of specific assets identified by AT&T for transfer to AmBell as of January 1, 1983. Because these assets are deemed necessary for the orderly and timely implementation of Computer II, we have preempted state action that would preclude the transfer of these assets. AT&T has also proposed to transfer, by July 1, 1984, assets relating to installation and maintenance services to be provided by AmBell. Because some of these assets may be utilized in the support of basic network services, states will have the opportunity to consider the effect transfer of these assets may have on basic services. States will have until September 1, 1983 to disapprove the transfer of specific assets. If no adverse action is taken by the states, AT&T may transfer those assets which it has identified for transfer as of July 1, 1984.

103. We have also reviewed AT&T's treatment of CPE preoperational expenses. We find that, for the most part, AT&T's approach is reasonable. There are two areas, however, warranting stricter accountability. First, we are requiring reporting by Bell System carriers and Western for CPE development similar to the approach AT&T has proposed for BTL. Second, we set forth guidelines AT&T should follow in accounting for preoperational expenses related to new CPE that is provided prior to January 1, 1983.

104. Finally, we have considered AT&T's Petition for Reconsideration of the *Enhanced Services Order*. AT&T's petition was granted in part with additional requirements placed on AT&T so that BOC and Long-funded enhanced services and CPE preoperational expense reimbursement issues could be resolved together. AT&T is required to establish BOC and Long Lines liability accounts to reflect monies owed ratepayers. We have established a framework for a federal reimbursement mechanism and required special reporting by AT&T to facilitate state review of the reimbursement amounts applicable to their jurisdictions. We require AT&T to further demonstrate whether any further reimbursement to ratepayers should be required on account of Western-funded CPE preoperational expenses. Finally, we find that AT&T's proposals for the organization and operation of AmBell appear consistent with Computer II requirements.

V. Ordering Clauses

105. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and (j) of the Communications Act, That the Supplement to the Capitalization Plan

filed by the American Telephone and Telegraph Company on July 1, 1982 IS APPROVED subject to the determinations rendered herein.

106. IT IS FURTHER ORDERED That the Petition for Partial Reconsideration filed by the American Telephone and Telegraph Company on July 16, 1982 is GRANTED to the extent set forth herein, and in all other respects is denied.

107. IT IS FURTHER ORDERED That the Chief, Common Carrier Bureau IS DELEGATED authority to take the actions set forth herein.

108. IT IS FURTHER ORDERED That the Chief, Common Carrier Bureau, IS DELEGATED authority to approve, if warranted, AT&T's plans for the capitalization of American Bell's offer of Picturephone Meeting Service.

109. IT IS FURTHER ORDERED That the Secretary of this Commission SHALL CAUSE this order to be distributed to each of the appropriate public utility regulatory commissions.

FEDERAL COMMUNICATION COMMISSION

William J. Tricarico *Secretary*

APPENDIX I

Summary of the Comments

1. The Kansas Corporation Commission Staff (KCCS) asserts that it is the responsibility and authority of state commissions to determine the manner in which the separation of AmBell from AT&T should take place, including how assets owned by a utility under state jurisdiction will be removed from regulated service and whether contractual arrangements entered into by a jurisdictional utility with an affiliate are reasonable and proper. KCCS complains that the supplemental capitalization plan does not disclose what accounting transactions will accompany the transfer of AmBell stock from the BOCs to AT&T. In addition, it argues that net book value is a poor measure of economic value, especially for land and buildings, which have probably increased in value, and that market value, which should be readily determinable, is a more appropriate measure of the transferred assets' value. The proposal to transfer deferred income tax and unamortized investment tax credit balances is also said to be inappropriate. With regard to preoperational expenses, KCCS states that details as to the manner and amounts of reimbursements have not been disclosed and that the FCC should ensure that all preoperational expenses are included. Finally, KCCS argues that an outside equity financing requirement should be imposed, as it would help to insure that the regulated services of AT&T and the BOCs (until divestiture) do not support the capital costs of AmBell's competitive ventures. If all of AmBell's equity is derived from funds provided by AT&T debt and equity issues, it states, there will exist no market assessment of AmBell's individual risk; hence, the cost of equity figures generated by the analytical methods proposed by AT&T will be subject to argument and manipulation by the interested parties in future regulatory proceedings. Using market data to aid in the determination of cost of equity will reduce the likelihood of error and the length of regulatory lag.

2. The State of New York Department of Public Service (NYDPS) argues that the BOCs should be reimbursed for appraisal and related costs incurred by the BOCs in

identifying a plant asset to be transferred, verifying its existence, determining its original cost and calculating its net book value. The costs should be paid by AT&T's regulated subsidiary, it states, not by customers of regulated services. While it acknowledges there may be merit in transferring installation and maintenance forces because of the difficulties BOCs may encounter in efficiently managing and deploying its workforce in a declining CPE market, NYDPS remains concerned about the effect such an arrangement may have on its ability to regulate and about the timing of AT&T's proposal. If AmBell chooses to ignore regulatory service standards, it states, it is questionable that any action could be taken directly against the unregulated entity. Because it believes that its concerns about the efficiency of BOC work forces will not materialize until after the 18 month transition period, it argues that it might be advantageous for the FCC to determine the merits of CPE detariffing and the timing of such a step before judgement is passed on AT&T's installation and maintenance proposal. Further, state commissions should not be obligated to recognize FCC authorized and approved contractual arrangements for installation and maintenance of new CPE by the BOCs on and after January 1, 1983. Work undertaken by the BOCs on behalf of AmBell must not result in a degradation in the quality of regulated services, it states, and no BOC employees should be diverted to unregulated activities until BOC work is completed.

3. The comments of the People of the State of California and the Public Utilities Commission of the State of California (California) state that the suggestion that asset valuation is an element of the Commission's regulatory regime which the states must accept conflicts with the tradition of state regulatory primacy with respect to the assets of the BOCs. In addition, they argue that the FCC should not seek to dictate the valuation of BOC assets. To the extent the FCC defines the value of transferred assets, it adds, the FCC should consider their going concern value. In addition, California criticizes AT&T's plan for the absence of discussion as to how the transfer of assets will affect ongoing programs of the BOCs, such as Pacific Telephone's sales program for embedded CPE and CPE in inventory, which are operated primarily out of PhoneCenter Stores. It complains that AT&T provides little detail on how the amounts to be reimbursed were developed and urges that all pre–1983 training of BOC employees should be charged to AmBell, rather than to the BOCs. Finally, it states because the numbers and items in AT&T's filing do not correspond to Pacific Telephone's oral discussions with California, there is a need for a list of specific assets to be transferred.

4. Federal preemption, according to the Illinois Commerce Commission (Illinois), would deny the states due process, because of the limited time which states have been allotted to discuss AT&T's capitalization plan. If the FCC chooses to assist AT&T in this "illegal usurpation of state authority", it states, the Commission must provide for an extended comment period concerning all aspects of the proposed capitalization plan. AT&T has failed to demonstrate, Illinois claims, that the exercise of appropriate state regulatory responsibility will illegally conflict with federal policy. It has failed to demonstrate that preemption is the action either preferred or required by the circumstances. Alternative valuation methodologies may be explored within the context of state regulatory proceedings without abrogating AT&T's rights or those of its shareholders and without interfering with the Commission's objectives in Computer II.

5. The National Association of Regulatory Utility Commissioners (NARUC) points out that many states have specific statutes requring state commission approval of asset transfers by regulated utilities, in which compensation to a utility for assets transferred out of regulated service is an important subject of examination. AT&T, it

states, has advanced no reason why state regulation of asset transfers should be displaced. State oversight and control of transfer prices, it claims, would not prevent implementation of Computer II and the opportunity to participate in the FCC's proceeding cannot substitute for the exercise of traditional state powers. AT&T's proposal to transfer all assets at net book value, it states, would avoid discussion of several questions of importance to the states and ignores significant differences between various classes of assets.

6. The American Satellite Company seeks confirmation from AT&T that whatever equipment must be located on customer premises in order to provide services such as Switched Digital Capability and Local Area Data Transport will not be provided by AmBell, but will instead be provided by the BOCs so that other common carriers will have a right to interconnect with those services on an equal basis with AT&T or AmBell.

7. GTE argues that for the first time the issue of AmBell's provision of installation and maintenance support for embedded CPE owned by the BOCs is before the Commission. It urges the Commission to reject that part of the supplemental capitalization plan which contemplates financing to permit AmBell to provide installation and maintenance support to the BOCs for their embedded CPE for the following reasons: (1) there is no public interest showing that such an arrangement is necessary or that the BOCs cannot continue to be self-supporting in this respect; (2) if AmBell were permitted to provide such support to the BOCs, AmBell would have a massive nationwide installation and maintenance force funded by ratepayers, endangering the development of a fully competitive market; and, (3) the problem of separating costs between regulated and unregulated activities would remain and would serve to deter competition. The open-ended support management which AT&T proposes, which would extend indefinitely beyond July 1, 1984, would not be in the public interest. The supplemental capitalization plan also fails to take account of the pending divestiture of the BOCs, after which, the regulated side of the "new" AT&T should be required to perform its own installation and maintenance for embedded CPE and be barred from obtaining any installation and maintenance from AmBell, just as the BOCs should also be barred. Finally, GTE states that the ultimate consequences of AT&T's plans for the distribution of AmBell stock are not explained.

8. United Technologies Communications Company (United) asserts that the Commission should defer the consideration of the capitalization plan until AT&T publicly discloses the following information concerning the transfer of assets to AmBell: (1) net income, capital budget and operating costs of AmBell; (2) estimated future staffing of AmBell; (3) selection and training of AT&T employees to be transferred; (4) a detailed list of the functions which AmBell employees will perform; (5) allocation and breakdown of research and development costs; (6) allocation and breakdown of AmBell's CPE marketing functions; (7) information concerning the proposed sale of CPE by AmBell; (8) effect of the asset transfers on the BOCs; (9) installation and maintenance agreements between AmBell and the BOCs; (10) future migration pricing strategies of AmBell and AT&T; (11) underlying accounting documentation used in the preparation of the capitalization plan. In addition, United argues that equitable and competitive factors dictate that the asset transfers occur at the higher of net book or fair market value, that adjusted net book value is an inappropriate measure for valuing all transferred assets, and that the adoption of adjusted net book value would be an abdication of the Commission's responsibility. United also believes that AmBell should be required to obtain at least 20 percent outside equity and, by the end of its first year of operation, at least 20 percent outside debt financing. Outside equity, it states, will encourage AmBell to operate more independently, reaffirm the subsidi-

ary's separation from AT&T to the rest of the world, and restrict AT&T's ability to cross subsidize competitive CPE products and engage in other anticompetitive activities. According to United, AT&T has failed to identify a methodology that necessarily includes a separate assessment of AmBell's risks and to identify a publicly traded competitor of AmBell with similar product offerings and systematic risk. The methodologies AT&T has proposed, it claims, are cumbersome and theoretically suspect. The vast differences in business risk between AT&T's regulated ventures and AmBell's competitive ventures cannot be mitigated by manipulating AmBell's capital structure. Furthermore, allowing AT&T to manipulate AmBell's capital structure may prevent AmBell's real risks from being observed by the Commission. Permitting AT&T to provide the subsidiary with large amounts of debt so as to reduce its financial risks would also not be desirable since the more AT&T invests in the subsidiary the greater will be AT&T's overall corporate financing requirements. Ratepayer cost of capital will increase to the extent AT&T has to borrow many to replace amounts loaned to AmBell to reduce AmBell's risks. The techniques cited by AT&T for estimating the required rate of return for a nontraded division of a firm using forms of the Capital Assets Pricing Model (CAPM) are not really applicable to AmBell because of the differences in systematic risk and capital structure. AT&T's alternative analytical techniques, United argues, likewise are inappropriate measures for determining AmBell's real risks. Outside equity financing provides the only feasible means for the Commission to separate risks. Outside debt financing is also necessary for the Commission to ensure the reasonableness of the rates for AT&T's regulated services. Without outside debt, the Commission will not be able to separate regulated from competitive risks since it will not be able to determine directly the cost of AmBell's debt capital. Even without a long operating history, it claims, AmBell should experience no difficulty securing outside financing or covering its interest costs from its operations. Finally, the Commission should not preempt state regulation regarding the transfer and valuation of BOC assets. According to United, valuation of assets by state regulatory commissions will not undermine the regulatory scheme established by Computer II. Asset valuation and transfer should be reserved to the states who are in a better position to determine these issues. Many jurisdictions require the local public utilities commission to evaluate the transfer of telephone carrier assets on the carrier's rate base. There is no basis to AT&T's contention that the Commission should preempt the state's authority over these traditional state functions.

9. According to the comments of the Independent Data Communications Manufacturers Association, Inc. (IDCMA), AT&T has failed to describe with any particularity the types of assets which will be transferred to AmBell. AT&T should be required to provide a complete description of these assets, it claims, and should, if any patents are to be transferred to AmBell, disclose the manner in which any patents will be valued, the manner in which it will license patents to AmBell, the terms and conditions of any such licensing, and whether such licenses will be exclusive. Further information is also needed with regard to AmBell's research, engineering, design and development, and manufacturing and distribution activities, the installation and maintenance assets to be transferred and contractual arrangements between AmBell and its affiliates. It is concerned that the proposed joint activities of AmBell and its affiliates may not comply with the Computer II rules. IDCMA charges that AT&T's proposed use of Western and Teletype Corporation, constitutes prohibited direct marketing of CPE through non-separated entities. AT&T's statements that SNETCO and Cincinnati Bell may directly market CPE after January 1, 1983, that the BOCs may market directly in "certain limited cases" is also said to represent direct marketing of CPE. In addition, because AmBell will not be providing all of its own manufacturing, research

and development, distribution, marketing and sales for deregulated CPE, it believes the $5 billion capitalization proposal may excessively burden the ratepayer. AT&T's assessment of the impact of this capitalization, it notes, assumes the continuation of the present Bell System; yet, the Modification of Final Judgement would divest the local exchange portions of majority owned BOCs. It also argues that the Commission has never mandated the offering by AT&T of new business CPE on a deregulated basis and that there is no foundation to AT&T's claim that state regulatory commissions must permit the BOCs to provide installation and maintenance for AmBell's intrastate business CPE. There is nothing, according to IDCMA, to preclude the states from refusing to allow the BOCs to provide installation and maintenance for AmBell. With regard to the valuation of the assets to be transferred from the BOCs to AmBell, IDCMA claims that it is essential that the valuation standard be the higher of net book value or fair market value. Finally, the Commission should require AmBell to obtain outside equity financing because it encourages the subsidiary to operate more independently, precludes the subsidiary from participating in consolidated tax returns with AT&T, subjects it to the scrutiny of independent financial analysts, assures an additional source of information (due to the requirements imposed by the Securities and Exchange Commission), and subjects it to the policing effect arising from the possibility of shareholder derivative suits.

10. The Computer and Business Equipment Manufacturers Association (CBEMA) claims that AT&T's proprosed treatment of accumulated reserves for deferred taxes improperly burdens the ratepayers. In addition, it believes the Commission should consider the question of asset valuation only in the narrow context of approving the proposed capitalization. With regard to preoperational expenses, CBEMA complains that AT&T makes no provision for assuring that AmBell's pricing objectives will include the recovery of those expenses advanced by the parent. That is, it refuses to put AmBell's preoperational expenses on AmBell's books of account. Because AmBell will not have a reserve or other accounting entry for these expenses, its profits, according to CBEMA, will necessarily appear larger than they are. Thus, AmBell's capital requirements and its cost of capital will also be lower. Alternatively, AmBell will be able to underprice its offerings and still appear profitable. The likely result of such accounting allowances, AmBell will have an anticompetitive advantage. CBEMA cautions that the Commission must carefully oversee all transitional employee transfers. Bell System organizations are said to be engaged in work intended for use by Ambell that will be completed after January 1, 1983. AT&T does not, however, indicate what the nature of the work is; nor is it clear that any such work which is never completed will nevertheless also be paid by AmBell. If AmBell is to compete fairly and without burdening ratepayers, CBEMA states, it must bear the cost of nonfruitful efforts as well as those bearing fruit. CBEMA states that it is also not clear what is included in the BTL engineering and management support systems that are to be developed for AmBell, nor whether the use of those systems will be so restricted that they could not be used as the basis for CPE and/or enhanced services software for AmBell. Some mechanism must be found to assure that the sharing arrangements between BTL and AmBell employees are completed as quickly as possible. CEMBA therefore urges that the Commission establish a reporting requirement for AT&T which will allow an accounting of these employee relocations by the Commission. It recommends at least semiannual review of the relocation efforts of those personnel who are employed by AmBell, so that the Commission will be able to monitor the transition more effectively and account more accurately for the cost of BTL space and services utilized by AmBell. Finally, CBEMA urges that the Commission should ensure that inconsistent state action does not impede achievement of the Computer II regulatory scheme.

11. The North American Telephone Association (NATA) claims that AT&T has fallen short of the Commission's call for a demonstration of how AT&T will assure that its unregulated offerings and their associated risk are to be separated from the assessment of an allowable rate of return on its regulated services. AT&T's methods are subject to the potential of widely variant application, it asserts, and have never been empirically proved. The simple expedient of requiring outside equity ownership to assure a market definition of the return demanded by investors, would avoid the regulatory burden associated with estimating equity capital costs and assure a result that would more adequately remove the risk that monopoly ratepayers will be required to support some of the cost of AmBell's competitive ventures. In addition, NATA claims, AT&T's equity-intensive capitalization would force monopoly ratepayers to bear the additional return requirements that may be imposed as a result of a higher equity ratio. It therefore recommends that the Commission initiate an inquiry through which uniform standards would be adopted to measure the effect. NATA also claims that AmBell's debt will be substantially assured by AT&T's presence as the sole or preeminent common stock holder of the firm. Thus, it claims, every increment of AT&T financial support to the subsidiary will be a drain on the consolidated financial health of the telephone utility enterprise, forcing the BOCs' cost of capital to increase. Because AmBell stock will not remain with the companies whose assets have been transferred, the ratio of equity to debt in the distributing firms will be increased. This will increase the cost of capital in those firms, worsened every time AT&T contributes capital to AmBell. Thus, it will be necessary to structure independent measures of AmBell debt costs. With regard to the valuation of assets to be transferred to AmBell, NATA urges that the Commission reject the use of adjusted net book value. Finally, NATA asserts that AT&T's estimate of $205,732,000 in expenses for CPE engineering supported through License Contract contributions understates the extent of License Contract expenditures for CPE engineering and development. NATA performs a series of calculations, aggregating BTL research and systems engineering CPE engineering costs and General Department expenditures related to CPE engineering and subsidiary formation. It finds that $557 million in costs should be repaid by AmBell for License Contract funds expended. AT&T's estimate of $119 million for CPE engineering and formation costs (or 21% of the figure yielded by NATA's calculations) requires, NATA urges, that a hard look be given to the figures advanced by AT&T. In addition, NATA argues that the cost to BOCs of assembling customer market information, valued at $2 billion and which will be transferred to AmBell, should either be reimbursed to the BOCs or be made available to AmBell competitors.

12. AT&T replies that consistent with the reasonable protection of its proprietary and competitive interests, sufficient information on the asset transfers has been provided. There is no need to list every piece of equipment to be transferred to AmBell, since: (1) assets within each class are homogeneous and will be valued in the same way; (2) AT&T will file schedules of the specific assets in each state that has a statute requiring state commission approval of the transfer, and such can be provided to the Commission's staff to verify the appropriateness of AT&T's valuation of the assets; (3) the assets to be transferred will be subject to internal and external audits before and after the transfers; and (4) additional information on buildings and leasehold improvements is being provided to the Commission in AT&T's responses to the Information Requests. In response to the concern about the impact of the transfers on ongoing state programs and the contention that AT&T should be required to show that the transferred assets are surplus to the BOCs, AT&T notes that, as a result of the Computer II decision, BOC PhoneCenter CPE activities will, after January 1, 1983, be limited to activities associates with embedded CPE. The

BOCs will either no longer perform all their present function or find it more cost effective to perform them in different ways. The assets being transferred were selected to ensure that the BOCs would not be stripped of assets that they would need to continue to provide basic services and embedded base operations. Because the BOCs should not have to replace such assets in the near future, the selection process of PhoneCenter Stores will not affect ongoing state programs. Further, under the Modification of Final Judgement, assets related to the provision of CPE will be transferred to AT&T from the BOCs. Therefore, BOC retail outlet leases will have no practical value to the BOCs in the immediate future. BOCs and their ratepayers are likely to save money by transferring the leases to AmBell, since otherwise ratepayers would have to absorb the costs of carrying unproductive assets.

13. AT&T believes that the transfer of assets identified in the July 2, 1982 supplement should be valued at adjusted net book value. This method, it states, is theoretically appropriate and can be implemented promptly and effectively. It rejects the idea that assets should be valued at the higher of net book or fair market value and asserts that going concern value is inappropriate. In addition, it argues, the proposed tax reserve adjustments to net book value are also proper and will not give AmBell an unfair competitive advantage.

14. AT&T contends that its methodology for capturing CPE engineering and subsidiary formation costs is accurate. In response to the claim that preoperational costs should be reflected on Ambell's books, AT&T notes that the Commission did not impose such a requirement in the *Enhanced Services Order* and that no new arguments for such a requirement have been advanced. AT&T also states that it has identified the amounts and methods of calculating preoperational expenses in its response to the Information Requests. Furthermore, because the transfer of assets does not occur within the context of a willing buyer-seller relationship, it should not be required to reimburse the BOCs for the costs incurred in identifying and valuing assets or in petitioning regulatory authorities for permission to effect the transfers to AmBell. With regard to the claim that detailed market information is being accumulated by the BOCs and transferred to AmBell, AT&T states that the information is predominantly financial or consists of a personnel skills inventory necessary for AT&T to assist the BOCs with the implementation of the Computer II requirements. It states that employees transferred to AmBell as of January 1, 1983 will be prohibited from taking with them any customer proprietary information obtained from BOC records. The contention that the BOCs should be compensated for this information, it argues, is an unjustifiable attempt to charge AmBell with good will or going concern costs (or to impute its profits to AT&T). In response to claims that the supplement understates the extent of License Contract expenditures for CPE engineering and formation costs for AmBell, AT&T states that the full amount of License Contract expenses have been set forth in the Paragraph 105 Reports. No credible support for these arguments, it asserts, has been presented.

15. AT&T states that its proposed financing of AmBell will have no adverse effect upon regulated services. The parties' comments are perfunctory restatements of positions that have already been refuted. The parties have failed to specify any approach that promises to be more reliable that the various approaches AT&T proposes to use to determine the allowable rate of return for its regulated services. The criticisms of AT&T's methodologies consist of generalities about the undesirability of leaving room for judgement or subjectivity. But, it notes, these criticisms would apply to any methodology. Fair determinations of rate of return using the methods it proposes are continually being made by regulatory commissions. Furthermore, any possibility of

cross-subsidization from the regulated exchange markets will disappear when the BOCs are divested. Thus, it concludes, there is no justification for requiring outside equity ownership of the subsidiary's common stock. There is likewise no justification for requiring outside debt financing. AT&T intends that AmBell will obtain outside debt, but not in the initial stages of the subsidiary's operations. Imposing an outside debt requirement before AmBell obtains profitability would provide at best a weak and ambiguous indication of its viability and would interfere with normal management prerogatives to conduct financial planning for the subsidiary. With regard to concerns about the impact of the transactions proposed in the supplemental capitalization plan, AT&T states: (1) that all of the transactions would decrease BOC debt ratios by only one-tenth of one percent; (2) that there is no reason to believe such an increased would affect BOC cost of capital; and (3) that BOC debt ratios will have to be reestablished in any event pursuant to divestiture. The use of capital structure to minimize AmBell's risk is proper, AT&T states, since it will help to assure that the risk of AT&T's investment in AmBell will not be borne by ratepayers. Furthermore, it adds, the comments have failed to show why the Commission should be concerned about the practice.

16. With regard to the statements that AT&T has not adequately described the activities which AmBell will perform and its relationships with unseparated AT&T affiliates, AT&T states that its responses to the Commission's Information Requests should resolve most of the concerns. AmBell's future relationships with affiliates were described comprehensively in the supplemental capitalization. The plan, however, was not intended to be an exhaustive list of all possible transactions. Indeed, it states, the comments suggest that many of the sharing arrangements proposed for AmBell with its affiliates are inconsistent with the Computer II requirements when they are not. Commission approval of Western's or BTL's accounting systems, AT&T assets, is not required before AmBell affiliates are allowed to provide CPE or research and development for AmBell. Commission review of these systems should be limited to a review for the purpose of accounting for shared administrative services and the provision of installation and maintenance services for AmBell by the BOCs. Further, a clear need exists, AT&T states, for colocating AmBell CPE development personnel in BTL facilities on a transitional basis. In this regard, AT&T approves of the suggestion raised by one party that the Commission should ensure that the transition be completed as soon as possible and that periodic reports on the progress of employee relocations be filed. The commenting parties' insistence that the sharing of physical space between AmBell and BTL be justified in detail, AT&T claims, is unreasonable in view of the unavailability of suitable alternative space and the temporary and transitional nature of the sharing. Appropriate costs will be accounted and information flow controls and employee information programs will be implemented and vigorously observed.

17. AT&T argued that state commissions must not be allowed to frustrate the proposed asset transfers or the installation and maintenance arrangements approved by the Commission. It is critical to the success of the Commission's regulatory regime that customers be able to obtain new Bell System CPE on and after January 1, 1983. For the Commission to defer to the states on such issues as the valuation of assets to be transferred to AmBell or the reasonableness of the arrangements for the provision of installation and maintenance to AmBell would conflict with the Commission's past decisions and with the fundamental purpose of the capitalization proceeding. AT&T asserts that the preemption issue is a narrow one and that there is sufficient basis upon which the Commission may preempt the states. The BOCs are entities fully subject to the Commission's regulation, it states, because they concur in AT&T's

interstate tariffs and, as to their interstate rates and services, are fully subject to regulation by the Commission. The only question presented here, it argues, is whether the states may bar transactions that the Commission has approved in the course of implementing its regulatory regime for the provision of CPE. AT&T therefore disagrees with the comments which argue that state commissions rather than the FCC must determine how AmBell is to be separated from its affiliates. AT&T also disagrees that state commissions should make the ultimate determinations regarding the reimbursement of preoperational expenses to BOCs because of the absence of state jurisdiction and the conflicts such an arrangement would present to the federal scheme. Although AT&T shares state commission concerns about the quality of services, it does not believe that the question as to whether the states would be justified in refusing to allow a utility to perform a valid contract to provide basic services must be answered on this proceeding. Because embedded CPE customers are potential customers of AmBell, it will not want to provide these customers with a lesser grade of service than it provides to its own customers. With regard to the contention that states may refuse to allow the BOCs to perform installation and maintenance for the subsidiary, AT&T notes that the Commission has allowed the BOCs to do so until July 1, 1984, under approved cost allocation and accounting schemes. To allow the states to bar the BOCs would directly conflict with the regulatory scheme adopted in Computer II. Furthermore, it states, nothing in Computer II bars AmBell from providing installation and maintenance services for the embedded base. According to AT&T, the contractual arrangement between AmBell and the embedded base entity following the transition period will mirror the transition period contract between the BOCs and AmBell. In addition, because the embedded base will be capped on December 31, 1981, the BOCs' need for an installation and maintenance force will rapidly diminish, leaving the BOCs and their ratepayers with the burden of supporting such a force with the CPE base to pay for such an operation. The transfer of the responsibility for installation and maintenance (for both new and embedded CPE), AT&T states, should be transferred with the embedded base in order to eliminate the difficulties of dealing with "hybrid" systems (i.e., systems consisting of both AmBell and BOC equipment).

APPENDIX II

ASSETS TO BE TRANSFERRED TO AMERICAN BELL, INC.

(Dollars in Millions)

	January 1, 1983		*July 1, 1984*	
Jurisdiction	*Total Net Plant and Equipment*	*Adjusted Net Book Value*	*Total Net Plant and Equipment*	*Adjusted Net Book Value*
Alabama	$0.8	$0.7	$2.9	$1.7
Arizona	1.0	0.8	5.6	3.8
Arkansas	0.1	0.1	1.0	0.8
California	11.9	10.5	56.6	41.3
Colorado	2.2	1.7	9.0	6.3
Delaware	0.2	0.1	1.1	0.8
District of Columbia	0.1	0.1	2.2	1.4
Florida	2.6	2.2	8.4	5.8
Georgia	1.2	1.0	10.6	8.3

APPENDIX II

ASSETS TO BE TRANSFERRED TO AMERICAN BELL, INC.

(Dollars in Millions)

Jurisdiction	January 1, 1983 Total Net Plant and Equipment	January 1, 1983 Adjusted Net Book Value	July 1, 1984 Total Net Plant and Equipment	July 1, 1984 Adjusted Net Book Value
Idaho (Mountain States)	—	—	1.0	0.7
Idaho (PNB)	—	—	—	—
Illinois	4.7	3.7	15.9	12.0
Indiana	1.0	0.9	2.8	2.0
Iowa	0.5	0.4	2.1	1.6
Kansas	0.5	0.4	3.4	2.4
Kentucky	0.2	0.2	2.8	1.5
Louisiana	1.7	1.3	7.2	4.9
Maine	0.1	0.1	0.4	0.2
Maryland	3.8	2.6	4.0	3.1
Massachusetts	3.1	2.5	6.1	4.7
Michigan	3.0	2.4	5.5	4.1
Minnesota	0.5	0.4	3.7	2.4
Mississippi	0.1	0.1	2.6	1.6
Missouri	2.0	1.5	9.5	6.8
Montana	0.1	0.1	0.8	0.5
Nebraska	1.2	1.0	1.7	1.3
Nevada	0.2	0.2	0.8	0.5
New Hampshire	0.2	0.2	0.5	0.3
New Jersey	2.2	1.8	8.9	6.4
New Mexico	1.0	0.8	2.9	2.2
New York	15.6	11.5	27.2	19.3
North Carolina	0.6	0.5	4.1	3.2
North Dakota	0.1	0.1	0.4	0.3
Ohio	1.8	1.3	3.5	2.2
Oklahoma	0.9	0.7	3.8	2.6
Oregon	1.0	0.8	1.9	1.4
Pennsylvania	2.4	1.7	14.5	11.0
Rhode Island	0.3	0.3	0.4	0.3
South Carolina	0.4	0.3	6.4	4.5
South Dakota	0.1	0.1	0.3	0.2
Tennessee	1.4	1.0	4.0	2.4
Texas	8.1	6.0	19.7	14.8
Utah	0.7	0.5	1.9	1.4
Vermont	—	—	0.2	0.1
Virginia	5.7	4.6	5.3	4.1
Washington	1.2	0.9	2.6	1.7
West Virginia	—	—	1.0	0.7
Wisconsin	1.5	1.3	2.4	1.8
Wyoming	0.3	0.2	0.9	0.6
TOTALS	$88	$69.6	$280	$202

FCC 82–491

CATV Cross-Ownership by Telephone Company
Reconsideration, Grounds For
Reconsideration, Petitions For, Denial of

Petitions for partial reconsideration of *Report and Order* creating an exemption from the telephone company-cable television cross-ownership rules for telephone companies in rural areas denied. Petitioners presented no new arguments supporting elimination of waiver requirement for telephone company acquisitions and oppositions to franchise renewals that warant reversal of decision.
—*CATV Cross-Ownership Rules*
CC Docket No. 80–767

FCC 82–491

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Elimination of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54–63.56, for Rural Areas.	CC Docket No. 80–767

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1982; Released: November 9, 1982

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING; COMMISSIONER FOGARTY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER RIVERA ABSENT.

1. The Commission has before it three petitions for partial reconsideration[1] of our *Report and Order* in the captioned proceeding (88 FCC 1.429 of the Commission's rules, 47 C.F.R. § 1.429. We find the parties have

[1] The petitions are filed by the National Telephone Cooperative Association (NTCA); Missouri Telephone Company, North-West Telephone Company and Platteville Telephone Company (Missouri group); and Telephone and Data Systems, Inc. (TDS), National REA Telephone Association (NRETA) and Ardmore Telephone Company, Inc. (jointly).

presented no new arguments that cause us to change our prior determinations. Their arguments largely challenge the underlying rationale of the rule, which is beyond the scope of this proceeding, and the petitions therefore are denied.

Background

2. On January 22, 1981, the Commission released a Notice of Proposed Rulemaking in Common Carrier Docket No. 80–767, 84 FCC 2d 335 (hereinafter cited as *NPRM*), proposing a number of alternative standards to establish an exemption from our telephone company-cable television cross-ownership rules[2] for telephone companies in rural areas. A review of the history of these cross-ownership rules led the Commission to question whether the policies the rules were designed to promote outweighed the burdens imposed in rural areas. Among other things, we sought comment on whether waivers should be required for a telephone company to compete with an existing independent cable company at franchise renewal time or for telephone company acquisition of existing independent systems.

3. Final rules in CC Docket 80–767 were adopted by the Commission and were released on November 27, 1981. There the Commission amended Part 63 of the rules to create an exemption from the telephone company-cable television cross-ownership rules in rural areas. However, the Commission found that a continuation of the waiver requirements for telephone company acquisitions and oppositions to franchise renewals was not overly burdensome in relation to the public interest benefits involved. Thus, the Commission stated that waivers would be required of telephone companies that proposed cable television service in any area where a competing cable television system is under construction or in existence.[3]

4. In response to its action, the Commission received the subject petitions seeking partial reconsideration of the decision. The petitions request that the Commission remove the waiver requirements for telephone companies in rural areas seeking to acquire existing systems or to compete with existing independent cable operators at franchise renewal time.

The Petitions and Oppositions

5. NTCA maintains that the Commission's decision to retain the waiver requirement for telephone companies seeking to acquire existing systems or to compete at franchise renewal time in rural areas is (1) inconsistent

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[2] Sections 63.54–63.56 of the Commission's Rules, 47 C.F.R. §§ 63.54–63.56. Detailed background on the telephone company-cable television cross-ownership rules may be found in the *NPRM*, 84 FCC 2d at 336–37. In esence, the rules provide that a telephone company may not provide cable television service in its telephone service area without first obtaining a waiver from the Commission.

[3] Report and Order, 88 FCC 2d at 576.

with the Commission's stated basis for elimination of the rules and (2) premised on circumstances not demonstrated by the facts of the acquisition waiver requests previously filed. NTCA claims that most of the acquisition waivers are filed by telephone companies seeking to acquire existing, deteriorating systems. It foresees that retention of the waiver requirement will delay or prevent new and better service for potential and existing subscribers.

6. NTCA also argues that significant amounts of Commission resources will be spent to resolve acquisition waivers and that the mere presence of the prohibition will discourage small telephone companies from implementing broadband services. NTCA reasons that if telephone companies are dissuaded from assisting communities with failing systems, the systems will go off the air and the public will be denied service. This result, NTCA asserts, would be in direct opposition to the Commissiion's stated goal of achieving "even more service" to rural areas. Moreover, NTCA contends that if a telephone company seeking to compete with an existing system at franchise renewal time has to undergo a costly and lengthy waiver proceeding in which the existing operator can oppose the application and delay it for over a year, there is little incentive for a telephone company to compete. Furthermore, with the waiver requirement, the local jurisdiction may not encourage telephone company participation or may decide in favor of the renewal applicant solely to avoid delay or service outage. The waiver requirement, it states, is also an encroachment on the legitimate exercise of local franchising powers.

7. The Missouri Group suggests that the definition of an area as rural or non-rural should determine for all purposes whether or not the cross-ownership rules will apply. The group states that retention of the waiver requirement will amount to inconsistent application of the cross-ownership rules as to telephone company constructon and acquisition of cable systems in rural areas, and will also place unnecessary administrative burdens and costs on the Commission in evaluating ooposed waiver petitions.

8. The group also argues that retention of the rule may have an undesirable effect on the competitive marketplace forces and on the ability of local franchising authorities to select and/or approve the next cable operator. It is possible, they contend, that cable systems may be sold to less qualified parties solely to avoid the uncertain delay attendant to a telephone company's waiver proposal.

9. The group maintains that the rule distorts local regulatory functions, in denying local franchising authorities the opportunity to make the best selection from competing cable system proposals. The current rules give the Commission the power to review and override the choice of local authorities even though the local authorities are more famililar with the needs and interests of their communities and are in a superior position to

compare proposals than is the Commission. The Missouri Group concludes that uniform application of the cross-ownership exemption to permit all forms of telephone affiliated cable system ownership in rural areas would rectify this result to a significant extent.

10. TDS, NRETA, and Ardmore Telephone Company, also claim that retention of the waiver requirement will serve to impede the development of cable service in many rural areas. These petitioners state that because numerous independent cable systems serving small towns in rural areas lack the financial ability to extend their lines into outlying low density areas, the economies of joint operation would permit the telephone company to serve outlying rural areas previously ignored by the independent operator. If the telephone companies are discouraged in purchasing existing cable systems in rural areas, a possible result could be that the unserved rural areas will continue to be deprived of cable services.

11. The National Cable Telephone Association, Inc. (NCTA) opposes these petitions on the basis that in our Report and Order in this proceeding the Commission has fully considered and rejected the petitioners' request. NCTA submits that in streamlning the waiver procedures[4] and in creating an exemption for rural areas in this proceeding, the Commission did not alter its basic underlying public interest determination that telephone companies should not, as a general rule, be affiliated with cable television systems operatring in their telephone service areas. NCTA maintains that retention of the waiver requirement in acquisition and franchise renewal cases continues to serve a valid public interest purpose. Since the basic ratonale for allowing telephone companies to own and operate cable systems in their service area is to provide for cable telephone service where it otherwise would not be available, NCTA asserts that it is fully consistent for the Commission not to extend any exemption to acquisition and franchise renewal situations.

12. NCTA complains that elimination of the waiver provisions would encourage anticompetitive practices, including the use of cross-subsidies to underprice competitive services; create the potential for abuse in the franchise process, especially in rural areas where cooperative telephone companies exist; and would allow telephone companies to gain significant portions of the independent rural cable industry.[5]

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[4] Cross-Ownership Rules, CC Docket No. 78–219, 82 FCC 2d 233 (1979), *recon. granted in part*, 82 FCC 2d 254 (1980), *further recon.*, 86 FCC 2d 983 (1981).

[5] NCTA presents studies with its opposition which it conducted to demonstrate that substantial numbers of cable television systems currently operate in communities having populations less than 2,500. Of the seven states analyzed (California, Montana, North Carolina, Oklahoma, Oregon, Pennsylvania and Vermont), 46% of all communities meeting the Commission's newly-created definition of "rural" already have cable service. In four of the states over half of the rural communities have existing cable systems. NCTA concludes that extending the exemption to existing systems would allow telephone companies to subsume significant portions of the independent rural cable industry, either through acquisition or renewal challenges.

13. CATV Service, Inc. also opposes a Commission exemption which would allow telephone companies to compete in franchise renewal situations. CATV Service argues that since independent cable service already is being provided in these circumstances, nothing would be gained from allowing the telephone company to acquire the franchise. On the other hand, CATV Service believes that in situations in which the cable company ceases to serve the area, the Commission should permit a telephone company to request a waiver to provide service. Thus, CATV Service does not oppose elimination of the waiver requirement in instances of acquisition.

Discussion

14. One of our major purposes in creating an exemption from the telephone company-cable television cross-ownership rules in rural areas was to lessen the impediments to the development of rural cable television service that may be caused by the cross-ownership prohibition. We found that an exemption for rural areas would help ensure that such areas having no cable television service are provided an opportunity to enjoy the same benefits associated with broadband services that urban areas already are experiencing or are likely to experience sooner.[6] However, we explicitly stated that our decision exempting rural areas from the telephone company-cable television cross-ownership rules was not a rejection of the policies underlying the rules.

15. In the order adopting the cross-ownership rules in 1970[7] we determined that:

> [T]he public interest in modern and efficient means of communications will best be served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid[ing] undue and unnecessary concentration of control over communities media either by existing carriers or other entities. We are of the opinion that the preservation of such competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of CATV service to the viewing public except where no practical alternative exists to make such service available within a particular community.

21 FCC 2d at 325. At this time, our policy remains unchanged.[8] Thus, we believe granting the relief requested would be inconsistent with the

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[6] Report and Order at 572.

[7] Final Report and Order in Docket No. 18509, 21 FCC 2d 307 (1970), *reconsidered in part*, 22 FCC 2d 746 (1970) *aff'd* General Telephone Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971).

[8] A comprehensive staff study of the Commission's cross-ownership rules concluded that the rules probably should remain in effect. *See* FCC Policy on Cable Ownership, Office of Plans and Policy, November 1981. We are analyzing the comments submitted in responose to the study and, if warranted, we shall initiate a proceeding to further refine, or possibly to eliminate, the rules. That proceeding would provide a more appropriate forum in which to weigh the competing public interest considerations presented by the rules and which lie at the heart of the petitioners' arguments.

underlying policy of the rules. While the petitioners stress that optimal service may not be provided, the continuation of this policy does not foreclose telephone companies from seeking to provide alternative or acquire existing cable television service. They still have the option of filing appropriate applications and waiver petitions.

16. Furthermore, the petitioners have not rebutted the findings in the *Report and Order*, that in the case of acquisitions and oppositions to franchise renewals, the costs of imposing the rules do not outweigh their benefits. The number of such waiver petitions have been few,[9] and a continuation of the waiver requirement would not be overly burdensome to either the rural areas or the Commission. The major arguments raised by the petitioners here were raised and considered by the Commission in response to the *NPRM* in this proceeding. The petitioners have raised no new arguments now which warrant reversal of our decision.

17. Accordingly, IT IS ORDERED, that the petitions for partial reconsideration filed January 4, 1982 by the National Telephone Cooperative Association; Missouri Telephone Company, North-West Telephone Company and Platteville Telephone Company; Telephone and Data Systems, Inc.; National REA Telephone Association and Ardmore Telephone Company, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

DISSENTING STATEMENT
OF
COMMISSIONER JOSEPH R. FOGARTY

IN RE: ELIMINATION OF TELEPHONE COMPANY—CABLE TELEVISION CROSS-OWNERSHIP RULES FOR RURAL AREAS (CC DOCKET NO. 80–767)—PETITIONS FOR PARTIAL RECONSIDERATION.

I dissent from this decision because the Commission has failed for too long now to move to reassess the basic telephone company/cable television cross-ownership rule prohibition. It has been one year now since the Commission sought public comment on the staff report of the Office of Plans and Policy, and still no Notice of Proposed Rule Making to reexamine this issue is even in preparation. In the meantime, as I have discussed elsewhere in detail,[10] American consumers are being denied the

[9] Commission records show that in 1980 only four such petitiions were acted on, in 1981 five were acted on, and only one such petition has been received so far in 1982.

[10] Revision of Processing Policies for Waivers of Telephone Company—Cable Television "Cross-ownership Rules," On Reconsideration, Separate Statement of Commissioner Joseph R. Fogarty, 82 FCC 2d 266 (1980); Issuance for Public Comment of FCC Staff Report on Cable Cross-Ownership Policies, Concurring Statement of Commissioner Joseph R. Fogarty, FCC Mimeo No. 471, November 17, 1981, (including here as an appendix to this statement).

benefits of telephone company competition in broadband telecommunications—benefits which sound regulatory policy cannot ignore. I will not reiterate my full views here. It is enough to say that I can no longer accept the aplication of the existing rule and policy of the telco/cable cross-ownership prohibition when there is no real commitment bring this critical issue under expeditious Commission review. Ironically, particularly in the current deregulatory milieu, anticompetitive regulation continues to rule. Enough time has passed to unshackle the telephone companies. I dissent.

APPENDIX

Concurring Statement of Commissioner Joseph R. Fogarty

In Re: Issuance for Public Comment of FCC Staff Report on Cable Cross-Ownership Policies

I concur in the Commission's decision ordering that the Report of the FCC Office of Plans and Policy staff on cable cross-ownership policies be issued for public comment. It should be emphasized, however, that the staff report is just that—a *staff* report—and at this point does not enjoy Commission approval.

In my view, the staff report presents a decidedly mixed bag of policy assessment and pronouncement. I have the same fundamental difficulty with this report that I had with its predecessor on Direct Broadcast Satellite policy:[1] proposed findings of abundant program diversity and assumptions of "workably competitive" markets in video technology and services must be supported by pragmatic fact as well as general economic theory. In finding that a "workably competitive" video media market now exists, the staff report's analysis lumps existing broadcast outlets and cable systems together with subscriptions television (STV), multi-point distribution systems (MDS), direct broadcast satellites (DBS), low power television, VHF drop-ins, video cassettes and video discs. It is far from clear, however, that cable television service is interchangeable with over-the-air broadcast television service. This substitutability issue is critical to the validity of the staff report's policy recommendations and warrants full public comment. It also appears to me to be little more than wishful thinking to predicate a finding of "workable competition" on new technol-

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[1] *Notice of Inquiry into the Development of Regulation Policy in regard to Direct Broadcast Satellites for the Period following the 1983 Regional Administrative Radio Conference*, Docket 80-603, 45 F.R. 72719 (November 3, 1980), Separate Statement of Commissioner Joseph R. Fogarty.

ogy and services (e.g., DBS, Low Power TV, and fledgling STV and MDS) which are more on the horizon than with us here and now. In the final analysis, this Commission must have more than merely the *assumption* of "workably competitive" marketplace as the basis for policy making.

In addressing the specific issues of braodcast television station- and network-cable cross-ownership, the staff report does make certain observations which deserve serious consideration. The report may be correct when it suggests that such cross-ownership may in fact *increase* diversity in both economic and First Amendment terms. In this regard, I agree that while a cable system could control a substantial share of the total video outlets in a community, the relevant policy question is not "How would a cross-owned system behave," but "Would its performance or that of the co-owned broadcast staton deteriorate under cross-ownership?" It may be, as the staff report suggests, that natural profit-making and investment incentives, as well as oversight and pressure from the local franchising authority, make it unlikely that cross-owned systems would be any less dedicated to the fullest possible develoment of cable's potential.

I also think that the staf report is excellent in its discussion of the benefits of vertical integration which may be lost to consumers as a result of overly-restrictive Commission ownership rule and policy.[12] The price to be paid for a reflexive anti-cross-ownership policy may be not only diminished diversity but no service at all.[13] In the final analysis, it is the result, and not the theory, that counts.

While the staff report purports to be responsive to these pragmatic principles in its recommendations regarding broadcast television station- and network-cable cross-ownership. it unfortunately balks at the consistent application of those principles to the telephone company-cable cross-ownership issue. Although the report acknowledges that considerable benefits of vertical integration would inhere in such cross-ownership, it nonetheless argues of retention of the existing prohibition based on the assumption that cable may become a direct competitor of the telephone company's local loop and local exchange services. While the report con-

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[12] While it is refreshing to see this acknowledgment of the benefits of vertical integration in the context of an assessment of cable ownership policies, it is regretable that this sensitivity has not been more manifest in other areas of Commission "deregulatory" endeavor. *See Computer Inquiry II, Final Decision*, Statement of Commissioner Joseph R. Fogarty, Dissenting in Part, 77 FCC 2d 504, 508–511 (1980). The degree of structural separation prescribed by the *Final Decision* for the dominant carrier subsidiary's provision of customer premises equipment and enhanced services reflected an analysis in which

> "all assumptions pertaining to the benefits of separation are treated as givens whereas any countervailing arguments petaining to the benefits of vertical integration are treated as unproven hypotheses subject to considerable doubt."

Id. at 508.

cedes that this competitive scenario is speculative, it insists that rescission of the cross-ownership prohibition would be "irreversible" in terms of forfeiting whatever benefits of inter-modal competition might occur as a result of future independent cable system development.

I have previously stated my opposition to the telephone company-cable cross-ownership prohibition[13] and will not repeat those views in full detail here. However, I think the line of argument in the staff report borders on hallucination. It is inanely wishful thinking to suggest that in the foreseeable future independent cable system operators will install the switching equipment and capacity necessary to duplicate and compete with the local telephone exchange. In terms of either economics or technological demand and investment, the staff report's scenario is sheer fantasy.

The staff report's "irreversibility" argument is even more troublesome for sound analysis and policy. The decision which will be "irreversible" here—and perniciously so—is the one recommended by the staff: the continued and perhaps permanent forclosure of telephone company participation and competition in the broadband telecommunications marketplace. Indeed, continuation of the prohibition on telephone company-cable cross-ownership will seriously retard, if not completely preclude, the introduction and deployment of broadband, fiber-optic technology in the local telephone exchange. It will be the American consumer who will suffer the loss of telecommunications benefits directly attributable to this myopic policy recommendation.

New and evolving fiber optic telecommunication technology offers the potential for economic replacement of copper wire with glass fiber as the transmission medium in the local loop of the telephone exchange. This potential is enhanced as research and development continues to lower both the cost and signal attenuation of fiber optics. The ability of fiber optic cables to handle wide-band signals has made fiber optics an ideal transmission medium for high capacity digital data links. This capacity for wide-band signals is certain to be highly useful in other telecommunications applications.

As we enter the Information Age, the need to move large amounts of data among geographically disparate points becomes imperative and acute. Our consumption of wide-band information in the diverse forms of audio, video, and data signals will grow dramatically. It is technically feasible for a single optical fiber to replace the existing network of coaxial cable and copper wire pairs, not only providing telephone and video service to homes but also the delivery path for many additional services. This Commission may not be able to "foster" the obvious public interest

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[13] *Revision of Processing Policies for Waivers of Telephone Company—Cable Television "Cross Ownership," On Reconsideration*, Separate Statement of Commissioner Joseph R. Fogarty, 82 FCC 2d 266 (1980).

benefits of fiber optic technology, but we should certainly recognize an obligation not to get in the way. As I observed in an earlier separate statement on telephone company-cable cross-ownership:

> [T]he Commission must . . . confront the possibility that the prospect of merging fiber optic technology with the local loop of the telephone exchange may offer "natural monopoly" economies in the provision of broadband facilities and services which a sound and rational policy analysis cannot ignore. If these economies emerge in significant magnitude, then telephone company competition in the cable television marketplace may be "unfair" only in the sense that it may be inherently unbeatable. If this should prove to be the case, the hard but necessary answer may have to be that the public interest is better served by such unfairness.[14]

I find it depressing that the staff report fails to deal seriously and rationally with this critical issue of technological and competitive foreclosure. While other countries have been experimenting successfully with optical fiber home connections,[15] there is no apparent active interest in applying fiber technology to the local loop in the United States. Given the constraints and disincentives embodied in the Commission's cross-ownership rules, it is not surprising that despite their service, technological, and investment capabilities, U.S. telephone companies have been reluctant to engage in substantial fiber optic research and development for the local loop. What is surprising—and also reprehensible—is that the agency of the U.S. Government charged with telecommunications oversight should be the perpetrator of this comparative disadvantage to the detriment of our national public interest.

The staff report purports to cope with this regulatory insanity by recommending that the Commission look with favor on telephone company waiver applications proposing "innovative cable or telephone technologies that require joint operations." This proposal is a classic case of too little too late. As this Commission's new "unregulatory" philosophy so insistently observes in other areas, the very existence and fact of regula-

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[14] 82 FCC 2d 266, 273.

[15] In 1978 the first visual information system employing fiber optic technology was completed in Japan. The Japanese system offers 158 subscribers a number of video signals, still pictures, and textual material and demonstrates the feasibility and practicability of using fiber optic technology in the field. HI-OVIS Project Interim Report-Hardware/Software Experiments, July 78–March 79, VISDA MITI Juridical Foundation, Tokyo, Japan, September 1979. In the same year, 1978, Bell Canada installed fiber optic cables at 36 of its subscribers' residences in Toronto, Ontario. Telephone, FM radio, and video services are offered over this Canadian system. P. Chouinard et al., "Description and Performance Review of the Yorkville Integrated Service Fiber Optic Trial," Conference Digest, ICC 1979. The French PTT is sponsoring a large scale trial of fiber optics technology in Biarritz, France. By the end of 1982, the first few of what will ultimately be several thousand subscribers will have access to a complete range of services, including television and telephone, all supplied via a fiber cable. M. Treheux and E. LeCoauil, "Multi-Services Optical Network," National Telecommunications Conference Record, 1980. For a general information survey of these and additional fiber optic local loop experiments, see R.J. Mills, "Subscriber Loop Applications of Fiber Optics," Conference Records, Electro 1981.

tion erects significant barriers to technological development and investment. Given the abominable history of this Commission's administration of a "waiver process" for telephone company provision of cable service to rural America,[16] and a reviewing mentality that sees the omnipresent spectre of "cross-subsidy" lurking in cable service provided by rural telephone cooperatives,[17] a promise of a possible waiver for "innovative" proposals will not provide the regulatory certainty required for multi-million-dollar telephone industry investments in local loop fiber optic research, development, and deployment. Nothing short of complete repeal of the telephone company-cable cross-ownership prohibition will do, and the national public interest demands no less.

I am hopeful that the Commission—if not also its staff—is prepared to act with intelligence and a sense of reality. Anti-competitive regulation in the guise of pro-competitive policy has ruled this area long enough for us to ascertain the detrimental results. I look forward to a rulemaking proceeding to eliminate this pernicious prohibition—the sooner the better.

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[16] *Elimination of the Telephone Company-Cable Television Cross-Ownership Rules for Rural Areas*, Separate Statement of Commissioner Joseph R. Fogarty, 88 FCC 2d 564 (November 5, 1981).

[17] *Id.*

FCC 82–435

Authority, Delegation of by FCC
Construction Permit, Issuance of
Domestic Public Land Cellular Radio Telecommunications Service
Domestic Public Land Mobile Radio Service, Authorizations
Domestic Public Land Mobile Radio Service, see also Mobile

Order adopted delegating authority to the Chief, Common Carrier Bureau to grant applications for cellular radio system construction permits and licenses where the cost of construction exceeds $10 million.
—*Celluluar Communications Systems*
CC Docket No. 79–318

FCC 82–435

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

An Inquiry Into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems.	CC Docket No. 79–318

ORDER DELEGATING AUTHORITY

Adopted: October 4, 1982; Released: October 6, 1982

BY THE COMMISSION:

1. In our *Memorandum Opinion and Order on Reconsideration* in this proceeding,[1] we established a scheme of accelerated processing with the objective of bringing cellular telephone service to the public as quickly as possible. As part of that scheme, we stated that the Common Carrier Bureau would grant each application that was the only one filed for a

[1] Cellular Communications Systems, 89 FCC 2d 58, 47 Fed. Reg. 10018 (1982).

particular frequency block in a particular market upon finding that "it comports with the public interest and there are no unresolved, substantial and material questions of face."[2] The Chief of the Common Carrier Bureau now has such delegated authority under Section 0.291(a) of the Commission's Rules. However, the Bureau Chief does not have authority to act on applications "where the estimated cost of construction . . . is in excess of $10 million. . . ." A review of the applications which were filed on June 7, 1982, for the 30 largest Standard Metropolitan Statistical Areas reveals that the cost of construction for almost all of them exceeds $10 million. Consequently, it is necessary for us to issue a specific delegation to the Chief, Common Carrier Bureau to enable the Bureau to implement our accelerated processing scheme.

2. Accordingly, IT IS ORDERED, pursuant to Section 0.201(d)(2) of the Commission's Rules, that the Chief, Common Carrier Bureau is delegated authority to grant such applications for cellular radio system construction permits and licenses where the cost of construction exceeds $10 million. This Order shall become effective immediately.[3]

3. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[2] *Id.* at 91.

[3] Our action today concerns agency procedure and practice, rather than a substantial rule, because it affects only the delegation of authority to the Chief of the Common Carrier Bureau. Therefore, there is no need for publication or service prior to the effective date of this order.

Air Hazard Menace to Air Navigation
AM Station, Class I, Clear Channel
Interference Nighttime
Special Service Authorization

Application for Special Service Authorization to operate during nighttime hours denied because of interference to clear channel operation. Applicant's service found inadequate to justify waiver. Application for new facilities denied because proposed tall tower would be an air hazard.

—*City of New York Municipal B/cing*
Docket No. 11227

FCC 82–428

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC) New York, New York	Docket No. 11227 File No. BSSA–266
For Special Service Authorization	
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC) New York, New York	Docket No. 17588 File No. BP–16148
WCCO RADIO, INC. (WCCO) Minneapolis, Minnesota	Docket No. 19403 File No. BP–19151
For Construction Permits	

Appearances

Alfred J. Tighe, Jr. (Brown & Tighe), *Charles S. Rhyne, William S. Rhyne* and *David M. Dixon* (Rhyne & Rhyne), *Allen G. Schwartz, Thomas P. Brown, III, Sheila Mahony, J. Lee Rankin, Norman Redlich,*

Evelyn Junge, Eugene Margolis, Adrian P. Burke, Gary Mailman, Joseph Bruno and *John C. Brennan* on behalf of the City of New York Municipal Broadcasting System; *Peter Shuebruk, Jerome S. Boros,Jack P. Blume, Benito Gaguine* and *Alan B. Kaufman* (Fly, Shuebruk, Blume, Gaguine, Boros, Schulkind & Braun) on behalf of WCCO Radio, Inc.; *Jerome Getz, Warren Spannaus, Richard B. Allyn, Lawrence Schwab* and *Peter W. Sipkins* on behalf of the State of Minnesota; *Staley Cohen* (Cohn and Marks) on behalf of WHAS, Inc.; *Mark T. McDermott* and *Robert D. Powell* and on behalf of the National Business Aircraft Association; *John S. Yodice* and *Charles J. Peters* on behalf of the Aircraft Owners and Pilots Association; *Daniel W. Toohey, Richard D. Marks* and *Tood D. Gray* (Dow, Lohnes & Albertson) on behalf of Ohio State University; and *Lawrence Bernstein, Charles W. Kelley, Walter C. Miller, Thomas B. Fitzpatrick, P. W. Valicenti, Roderick K. Porter* and *Arthur I. Steinberg* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

Decision

Adopted: September 23, 1982; Released: October 4, 1982

BY THE COMMISSION: COMMISSIONER QUELLO APPROVING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER WASHBURN DISSENTING TO THE DENIAL OF WCCO'S APPLICATION; COMMISSIONER FOGARTY NOT PARTICIPATING.

I. Introduction

1. The City of New York Municipal Broadcasting System (WNYC) operates stations WNYC-AM, FM, and TV. WNYC-AM, the subject of these proceedings, is a 1 kW daytime-only station licensed on 830 kHz. Since 1943, the Commission has permitted WNYC to operate from 6:00 am to 10:00 pm pursuant to various temporary Special Service Authorizations (SSA). These were originally granted to provide "needed wartime services."[1] During pre-sunrise and post-sunset SSA operation, WNYC causes co-channel interference to station WCCO, Minneapolis, Minnesota, a Class I–A clear channel station licensed to WCCO Radio, Inc. (WCCO).[2] WNYC's SSA operation curtails and interrupts[3] WCCO's oth-

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[1] Petition to Cancel SSA, filed July 21, 1954, by WCCO at 3. Previously the Commission had denied WNYC's request for permanent nighttime authority. *City of New York Municipal Broadcasting System*, 9 FCC 169 (1942).

[2] The clear channels were allocated to permit wide area service by dominant (Class I) stations. Such service is provided by either single (Class I–A) or multiple (Class I–B) stations. Other stations providing either wide area or localized service (Class II) may be assigned to the clear channels

erwise protected nighttime operation from one to nearly six hours a night, depending on the time of the year.[4] Thus, without SSA authorization, WNYC would be required to sign on no earlier than local sunrise in New York City and sign off no later than sunset in Minneapolis to avoid objectionable interference. During the summer this limitation on WNYC's authority would have little effect because local sunrise occurs earlier than 6:00 am EST and sunset in Minneapolis occurs as late as 9:00 pm EST. However, during the winter, the daytime limitation would substantially curtail WNYC's service, because WNYC would be required to sign off as early as 5:30 pm EST.

2. In 1954, because of WCCO's objection, WNYC's then pending SSA application was designated for hearing.[5] An Initial Decision issued[6] recommending a grant of SSA authority, but the Commission held the proceeding in abeyance without ruling on the exceptions because of the pending clear channel proceeding. In 1963, following issuance of the Commission's 1961 *Clear Channel Decision*,[7] the Commission reactivated this proceeding. That Decision lifted a previously imposed freeze on the assignment of Class II stations on the 25 clear channels with Class I–A stations to the extent of permitting the assignment of a single Class II–A station on 11 (later 12) of the channels and a Class II–B station on two additional channels. The Class II–A stations were restricted to specified

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provided they do not subject the pertinent Class I station to objectionable interference as defined by the Rules. *See* Section 73.21(a) of the Rules; *See also Clear Channel AM Broadcasting*, 78 FCC 2d 1345, *recon. denied*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University* v. *FCC*, No. 80–1824 (D.C. Cir. January 26, 1982) (hereinafter 1980 *Clear Channel Decision*). Station WCCO was formerly licensed to WCCO Radio, Inc.'s parent corporation Midwest Radio-Television, Inc. *See* FCC 81M–1669, released May 29, 1981.

[3] WCCO operates 24 hours a day.

[4] SSA authorization is required for WNYC to operate at the following hours (EST):

January	6:00 am—7:15 am	6:00 pm—10:00pm
February	6:00 am—6:45 am	6:45 pm—10:00pm
March	6:00 am—6:15 am	7:15 pm—10:00 pm
April		8:00 pm—10:00 pm
May		8.30 pm—10:00 pm
June		9:00 pm—10:00 pm
July		9:00 pm—10:00 pm
August		8:15 pm—10:00 pm
September		7:30 pm—10:00 pm
October		6:30pm—10:00 pm
November	6:00 am—6:45 am	5:45 pm—10:00 pm
December	6:00 am—7:15 am	5:30 pm—10:00 pm

Thus, the number of SSA hours needed to provide uniform service from 6:00 am—10:00 pm EST varies from 5 ¾ hours in December to 1 hour in June and July. WNYC Exhs. 72–3, 72–4; WCCO Exh. 72–17, App. 1.

[5] FCC 54–1463, released December 6, 1954. WCCO had also objected in whole or in part to previous grants. Petition to Cancel SSA, *supra* note 1.

[6] FCC 57D–53, released July 8, 1957.

[7] *Clear Channel Broadcasting*, 31 FCC 565 (1961).

locations with no other primary nighttime service ("white areas"). The *Clear Channel Decision*, as well as subsequent clear channel decisions, expressly declined to resolve the WNYC-WCCO controversy. WNYC subsequently, pursuant to a Commission suggestion, applied for permanent authority to operate during the SSA hours and for a change of antenna site and increase in power to 50 kW.

3. In 1972 the Commission redesignated the issues and consolidated the proceedings with an application by WCCO to relocate and increase the height of its antenna.[8] Hearings were concluded and the record was closed on August 24, 1977.

4. Administrative Law Judge Frederick W. Denniston in a Supplemental Initial Decision[9] granted WNYC's applications for permanent nighttime authority and for a new antenna site and higher operating power. The ALJ denied WCCO's application for modification of its antenna. The ALJ found that WNYC provided a uniquely valuable service to New York City, for which WNYC-FM was not an adequate substitute. This service justified, in the ALJ's view, granting nighttime operation despite the fact that such operation causes objectionable interference to the eastern portion of WCCO's nighttime secondary service area and would violate the Commission's 10% rule.[10] The ALJ granted WNYC's application for 50 kW operation because it would reduce, through directionalization, the degree of interference to WCCO and would significantly increase WNYC's coverage of New York City. The ALJ denied WCCO's request to relocate and increase the height of its antenna finding that the proposed tall tower would be an air hazard. The ALJ also removed a condition which made any grant to WCCO contingent on the outcome of the *Cowles Broadcasting, Inc.* proceeding, involving the character qualifications of a related coporation.

5. WNYC, WCCO, the Broadcast Bureau, and three intervenors[11] filed Exceptions to the Supplemental Initial Decision and Replies.[12] WCCO requested oral argument. Additionally, on April 10, 1981, WCCO petitioned for an order to show cause why WNYC should not accept a proposed change in frequency to 820 kHz.[13] The Commission heard oral argument on July 21, 1982.

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[8] 33 FCC 2d 285 (1972).

[9] FCC 78D–36, released June 29, 1978 (hereinafter Supplemental Initial Decision or SID).

[10] The 10% rule provides that interference from other stations may not affect a station's service to more than 10% of the population within the station's normal interference free service area.

[11] The intervenors, the State of Minnesota, the National Business Aircraft Association (NBAA) and the Aircraft Owners and Pilots Association (AOPA) are concerned only with the air hazard issue.

[12] Pleadings under consideration are: Limited Exceptions filed July 9, 1979, by the State of Minnesota; Exceptions filed July 10, 1979, by WCCO and by the Bureau; Limited Exceptions filed July 10, 1979, WNYC, by AOPA, and by NBAA: Replies filed December 21, 1979, by WCCO, by WNYC, by AOPA, and by NBAA: and a Reply filed April 10, 1979, by the Bureau.

[13] Pleadings relating to the Petition for Order to Show Cause are: an Opposition filed May 7, 1981, by the Bureau; an Opposition filed July 15, 1981, by Ohio State University, a potentially mutually exclusive applicant for an authorization on 820 kHz; a Motion to Strike filed May 7, 1981, by WNYC; and an Opposition to the Motion to Strike, filed May 26, 1981, by WCCO.

6. We have examined the findings and conclusions of the ALJ as set forth in the Supplemental Initial Decision,[14] the arguments of the parties, and the record, and we conclude that WNYC has not established that its programming is required to satisfy the special needs and requirements of its service area which would justify its interference to clear channel station WCCO, Minneapolis, Minnesota. In light of this conclusion, we need not consider those exceptions concerning the alleged prejudice of WNYC's proposed operation to the future development of adjacent channels (Issue 7); WNYC's alleged violation of the 10% Rule (Issue 6); the availability, maintenance and suitability of WNYC's proposed antenna site (Issues 8, 9, and 19); WNYC's alleged violation of Section 1.65 of the Rules (Issue 20); WNYC's financial qualifications (Issue 21); and WNYC's ascertainment of community needs (Issue 12). With respect to WCCO's application for new facilities, we find that its proposed antenna will be an air hazard, and we agree with the ALJ that its application should be denied.

II. WNYC's Applications for Nighttime Operation

A. WNYC's areas and populations—Issue 1.[15]

7. The ALJ found[16] that WNYC's present nighttime or SSA operation[17] serves 4,388,100 people in an area of 138 square miles. The entire service area lies within but does not cover the entire city of New York. WNYC's proposed 50 kW nighttime operation would serve 9,926,159 people in an area of 658 square miles, which would include portions of New Jersey and Connecticut as well as additional coverage of New York City. The 50 kW proposal would increase WNYC's nighttime coverage of New York City from slightly over 50% to 99.7% (7,869,972).

8. All of the areas in WNYC's present and proposed nighttime service areas receive at least five primary nighttime aural signals. New York City has 28 full-time commercial aural services and 3 educational stations licensed to it, with an additional 18 commercial aural services and 4 educational stations licensed within the New York SMSA outside of New York City.

B. WNYC interference to WCCO—Issue 3.

9. The ALJ found[18] that WNYC's nighttime operations causes no objectionable interference to WCCO's primary (groundwave) service

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[14] Those findings and conclusions are adopted except as modified by this decision.

[15] The facts underlying this issue and Issue 3 are not materially disputed. Those facts, however, are crucial to an evaluation of the need for WNYC's programming and the extent of its interference with WCCO.

[16] SID at paras. 18–52.

[17] We will refer to WNYC's nighttime operation as either nighttime operation or SSA operation. We will use WNYC to refer to the licensee and to the AM station.

[18] SID at paras. 77–86.

area, but does cause objectionable interference to the secondary (skywave) service area.[19] Objectionable interference to WCCO's operation occurs in a crescent shapted area comprising the eastern portion of WCCO's secondary service area bounded by WCCO's 0.5 mV/m 50% skywave contour and inlcuding portions of Michigan, New York, Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee and Mississippi.

10. WCCO's service area includes 21,589,889 people in 1,005,656 square miles. Objectionable interference form WNYC's present 1 kW operation now affects a total of 7,905,300 people in an area of 149,600 square miles in WCCO's present secondary service area.[20] This area of interference includes a "white area" (no other primary[21] aural signals) encompassing 76,300 people in 5,200 sqaure miles and a "gray area" (only one other primary aural signal) encompassing 244,300 people in 11,100 square miles. WNYC's proposed 50 kW operation would, because of directionalization, result in a reduced amount of interference, affecting 7,158,600 people in 125,800 square miles, including a white area with 51,000 people in 1,800 square miles and a gray area with 195,100 people in 8,300 square miles. All portions of the interference areas receive at least ten other secondary services.

C. WNYC's programming: New York City's special needs and requirements—Issues 10 and 11.

11. The ALJ found[22] that WNYC is a noncommercial public service-oriented station serving as an adjunct to the New York City municipal government. It is affiliated with and is a flagship of the National Public Radio System.[23] Many government officials and distinguished New York citizens attested to the extremely valuable public service rendered by WNYC. Approximately 45% of WNYC's schedule is devoted to news, public affairs, and other informational programming, 35% to classical music, and 20% to spoken word presentations, such as drama. WNYC

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[19] An AM radio signal is propagated in two ways. During the day the "primary" or "groundwave" signal travels horizontally across the earth's surface between the transmitter and receiver. At night a second mode of propagation occurs as well. A "secondary" or "skywave" signal is reflected from the atmosphere's ionosphere and may be received hundreds or even thousands of miles away. Skywave propagation makes AM suitable for the wide area nighttime service contemplated for the clear channels. The skywave signal is protected from interference to its 0.5 mV/m 50% field intensity contour, which is generally located 700–750 miles from the transmission point. Interfering signals may not exceed 25 uV/m. *See* 1980 *Clear Channel Decision*, *supra* note 2; Section 73.182(v) of the Rules.

[20] This figure excludes areas not served by WCCO because of interference from station WHAS, Louisville, Kentucky.

[21] Primary service refers to the area in which a station's ground wave is not subject to objectionable interference or fading. Section 73.11(a) of the Rules.

[22] SID at paras. 270–378.

[23] The term flagship is used in the sense that WNYC is the principal regional affiliated station in the New York Metropolitan Area, inlcuding New Jersey and Connecticut, for the distribution and dissemination of NPR programming. Tr. 3489–92.

regularly preempts its scheduled programming to present programs of particular public importance.

12. An extensive number of informational and cultural programs are presented in whole or in part during SSA hours. The availability of SSA hours provides time for WNYC's "festival" or "block" programming, in which large blocks of program time are devoted to a single subject. Some festivals concerned new American composers, narcotics addiction, education, Lawrence Olivier, Shakespeare, aging, and women. Subjects dealt with in the festival format sometimes were incorporated into the regular schedule.

13. Other informational programming is either presented during SSA hours or could be scheduled only because SSA hours provided compensating time in the WNYC schedule. WNYC broadcasts live lectures from Cooper Union during SSA hours and other lectures from local universities. Readings from leading magazine articles are presented for the blind on "Magazine Spectrum." Toward the goal of international understanding, WNYC broadcasts foreign press reports and hispanic programming during SSA hours and also provides time for programs originating abroad and programs about the United Nations. Other informational programming concerned youth, education and health.

14. WNYC devotes considerable time, inlcuding some SSA time, to programming on behalf of municipal and other government agencies. These include consumer affairs agencies, the Veterans Administration, agencies concerned with children and the handicapped, the police, public health agencies and the city council. WNYC frequently preempts regularly scheduled programming to broadcast live public hearings before municipal, state, and federal agencies, and meetings of the United Nations. WNYC broadcasts news with a local emphasis and serves as a direct link to the Mayor's office, government agencies, the police and fire departments, and the weather service, during emergencies as well as at other times. These types of broadcasts are often aired during SSA hours.

15. Several types of programming require SSA hours to ensure access to the public. Public meetings and government reports during emergencies have already been alluded to. Other programs include election coverage and spot announcements from public service and philanthropic agencies. Without SSA time, WNYC could not conduct all of its extensive interviews with local candidates or provide live election returns. The number of groups having public access through WNYC spot announcements would be curtailed without SSA time.

16. "Traveler's Timetable," broadcast during morning SSA hours with the aid of extensive municipal resources, provides information about traffic and public transportation to New York's commuters.

17. WNYC also presents NPR programming and serves as an outlet for programming by the Smithsonian Institution, the American Civil Liber-

ties Union, and other groups. It uses SSA hours to broadcast an extensive schedule of classical music programming.

18. the ALJ found that WNYC's pre-sunrise and post-sunset programming served the special needs and requirements of its service area.[24] In the ALJ's view, WNYC's preemption policy was unique and valuable, and WNYC plays a unique role as the voice of the municipal government. He found that, although other New York stations carry programming similar to many of the types of programming on WNYC, no showing had been made that this other programming measures up to WNYC's high standards. However, he acknowledged that a previous ALJ had erroneously excluded evidence of alternative programming in New York. Although a subsequent ALJ reversed that ruling and admitted exhibits by both WNYC and WCCO, the present ALJ concluded that the absence of thorough cross examination left the record somewhat deficient on this point. The ALJ found that WNYC met the long term needs and requirements of New York City.

19. *WCCO's and the Broadcast Bureau's Exceptions.* While conceding that WNYC's programming is commendable, the other parties deny that WNYC has demonstrated special need for its SSA operation. They assert that other stations in New York City carry many programs similar to those broadcast by WNYC. The Broadcast Bureau argues that WNYC's connection with the municipal government does not in itself establish special need. Moreover, according to the Bureau, the SSA programming could be carried by WNYC-FM.

20. *WNYC's Reply.* WNYC argues that it is contrary to the public interest to eliminate such highly meritorious programming. WNYC also submits that numerous witnesses testified to the special needs served by the various categories of programming discussed in the Supplemental Initial Decision. WNYC emphasizes that New York City's unique size and diversity creates extraordinary special needs. In WNYC's view, its link with the city government provides a special and unique service to the people of New York. WNYC urges the that other stations carrying programming similar to WNYC's fail to match the quantity and quality of its programming.

21. *Analysis.* WNYC has demonstrated that its programming is highly meritorious and that curtailing such programming would be undesirable. To this extent we agree with the ALJ. However, WNYC has not shown that its SSA operation is necessary to serve special needs and requirements of its service area. The designated issue requires WNYC to show more than that its programming is meritorious or that it serves community needs for purposes of an ascertainment inquiry as it has done here.

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[24] SID at paras. 379–86.

22. We previously explored the factors relevant to the question of special needs and requirements in *Iowa State University of Science and Technology,*[25] in which station WOI, Ames, Iowa, sought pre-sunrise operating authority despite interference to Class I Station KFI, Los Angeles, California. In denying WOI's request, we determined that WOI's early morning programming ("Down on the Farm") was not essential to satisfy the special needs and requirements of its service area. We found that another station in WOI's service area broadcast agricultural market reports similar to those on "Down on the Farm." Other portions of "Down on the Farm" were deemed unnecessary to the farmer's immediate daily economic decisions and, therefore, could be broadcast later in the day. WOI programming presented classical music and religious programming that was not duplicated during early morning hours. But, we considered it significant that other forms of religious and musical programming were available in the morning, and other classical music was available later in the day. Thus, in *Iowa State* we determined that a demonstration of special needs and requirements entails: first, that no other station provides the service area with substantially similar programming, and, second, that any unique programming would not be effective if presented during the day by the applicant.

23. Applying this test to the record before us, we turn first to the question of whether other stations in New York City provide programming substantially similar to WNYC's. Initially we note that the record is somewhat deficient in this regard, because, as the ALJ noted, a previous ALJ improvidently restricted the introduction of evidence on this point.[26] However, we are nevertheless able to draw meaningful conclusions based on the existing record. At least some of WNYC's programming appears to be unique when compared with the description of other stations' programming submitted by WCCO.[27] No other station appears to present anything comparable to WNYC's extensive coverage of public hearings, United Nations affairs, and the foreign press. Apparently no other station offers the equivalent of WNYC's festival format for intensive exploration of public affairs and cultural subjects, and no other AM station in the city carries National Public Radio programming. Moreover, in some areas, such as programming concerning veterans, children, the handicapped, and aging, WNYC seems to have provided programming of significantly greater depth than that of the rest of the market. SSA hours are used for at least some of these programs.

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[25] 19 FCC 2d 36 (1969) (hereinafter *Iowa State*).

[26] Tr. 3517–23. The two principal sources of evidence in the record are an assessment of other stations by WNYC's Program Director (WNYC Exh. 72–6) and a survey by WCCO of programming listed in other stations; renewal applications (WCCO Exhs. 72–30, 72–31).

[27] WCCO Exhs. 72–30, 72–31.

24. However, in a number of areas, other stations do provide at least a rough equivalent of WNYC's programming. A number of stations provide traffic and mass transportation information as carried on "Traveler's Timetable," which occupies WNYC's weekday morning SSA hours.[28] WNYC's classical music and minority oriented programming is substantially similar to that of New York City's three other classical music stations and six minority oriented stations.[29] Other New York City stations appear to provide significant amounts of programming concerning consumer affairs, narcotics, health, nutrition, housing, art and theater reviews, women, educational affairs, news, sports, election returns, weather and public service announcements.

25. On balance, we find it most significant that other New York Metropolitan area stations provide substantial amounts of information programming, minority oriented programming, and classical music, supplementing that of WNYC. The fact that these stations may not provide the breadth of WNYC's programming or that in some narrow subcategories other stations do not provide programming similar to WNYC's is not as significant. Moreover, the fact that with few exceptions, such as live coverage of hearings, WNYC's programming culd be broadcast during the day and still benefit New Yorkers, strongly militates against a finding that the SSA hours are necessary to serve the special needs and interests of New York City. Additionally, as indicated below, we also find that WNYC-FM can adequately substitute for any loss of service from WNYC.

D. Use of WNYC-FM to satisfy needs—Issue 13.

26. The ALJ found that WNYC-FM cannot be used as a substitute for WNYC.[30] He noted that the FM program schedule is separate and distinct from the AM schedule and that the FM station concentrated on classical music (which is broadcast stereophonically), educational, and cultural programming. The ALJ found that NPR funding is contingent on separate programming. He also found that the AM and FM stations sometimes preempted programming to carry public hearings or live concerts.

27. The ALJ also found that technical obstacles existed to the reception of WNYC-FM. Although the ALJ found that WNYC-FM's 3.16 mV/m

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[28] WCCO Exh. 72–30 at 74–76.

[29] The record establishes that WQXR(AM/FM) and WNCN(FM) are classical music stations and WVOX and WBAI(FM) carry substantial amounts of classical music. *Id.* at 24. WWRL(AM/FM) and WLIB(AM/FM) are black-oriented and WJIT (formerly WHOM) and WADO are hispanic oriented. *Id.* at 3.

[30] SID at paras. 403–26.

contour[31] covers nearly all of New York City and thus exceeded the size of WNYC's AM nighttime service area, he believed that because of FM's propagation characteristics, fewer people actually receive the FM signal. The ALJ noted that the predicted FM field intensity values specified in the rules are only approximations and, in any event, are predicted to be met or exceeded only 50% of the time at 50% of the locations.[32] Based on Arbitron statistics, the ALJ believed that as much as 62.4% of the population could not receive the FM signal because they did not own FM receivers. In this regard, the ALJ found that in 1972 only 20.7% of automobile radios could receive FM, and in the past listeners had protested when a band concert had been shifted from AM to FM.

28. WCCO's and the Broadcast Bureau's Exceptions. WCCO and the Broadcast Bureau maintain that WNYC-FM can be used as a substitute for the AM. They argue that the Commission considers AM and FM a single, technically fungible aural service and that FM offers a more reliable interference free service.[33] They further argue that, although at present the AM and FM maintain largely separate program schedules, programming could be interchanged if necessary. WCCO asserts that during SSA operation ⅓ of WNYC's programming is duplicated or simulcast on the FM station. It concludes that the loss of the entire SSA schedule could be compensated for by using the FM station.

29. The parties also dispute the existence of technical barriers to receiving FM. They assert that WNYC has advanced no reason to question the broad coverage of New York City indicated by the extent of the 3.16 mV/m contour. Moreover, the Bureau submits that FM set penetration has enjoyed a steady increase in recent years. The Bureau proffers figures indicating that in 1977, 56% of automobile receivers had FM capability and that the figure for other receivers was even higher.[34]

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[31] Commission rules require an FM station to provide a minimum field intensity of 3.16 mV/m over the entire principal community to be served. Section 73.315(a) of the Rules. Conversely, if a community lies within an FM station's 3.16 mV/m contour, the community is considered adequately served. *AM Station Assignment Standards*, 54 FCC 2d 1, 2 n. 1 (1975); *Broadcasting Station Assignment Standards*, 39 FCC 2d 645, 674 (1973).

[32] *See WSTE-TV, Inc.*, 33 FCC 2d 438, 449 n. 17 (Rev. Bd. 1972), *rev. denied*, 40 FCC 2d 773, *recon. denied*, 42 FCC 2d 290 (1973), *aff'd in part remanded in part*, 566 F.2d 333 (D.C. Cir. 1977); Section 73.311 of the Rules.

[33] *Broadcast Station Assignment Standards*, 19 FCC 2d 472, 475 (1969).

[34] The Bureau's proffer consists of a report from the Consumer Electronics Group of the Electronic Industries Association, submitted as an attachment to its Exceptions. The Bureau's request for official notice of this report is granted. The report corroborates the recent growth of FM as a broadcast medium to a point where it has attained competitive parity with AM. We relied on evidence of the growth of FM as a viable competitive market force in *Deregulation of Radio*, (Notice of Inquiry and Notice of Proposed Rulemaking) 44 Fed. Reg. 57636, 57646–47 (1979). The parties, of course, may rebut this information by filing petitions for reconsideration. *Compare Akron Telerama, Inc.*, 11 RR 2d 196 (Adm. L.J. 1967).

30. *WNYC's Reply.* WNYC asserts that the other parties overstate the degree to which the AM and FM programming can be interchanged. WNYC urges that Commission declarations that AM and FM constitute a single aural service were cited out of context and are inapposite. According the WNYC, the AM and FM stations are programmed, as a matter of licensee discretion, for different audiences and that the listening public would be inconvenienced if programming were interchanged. WNYC asserts that present duplication of programming is confined to significant events and therefore that such duplication does not indicate that further interchange of programming would be appropriate. In fact it argues that because the stereophonic capabilities of FM are ideally suited to cultural programs, further duplication would be inappropriate. WNYC argues that that alleged facts relied on by the Bureau to rebut the ALJ's findings about barriers to FM reception are not in evidence.

31. *Analysis.* Upon consideration, we disagree with the ALJ and find that WNYC-FM is a suitable substitute for the AM station. Unlike the ALJ, we see no basis for discounting WNYC-FM's broad coverage of New York City on technical grounds. We now recognize FM as a service equal to AM with a signal of equal or superior technical quality.[35] We relied on FM as a substitute for AM in *Iowa State* and reached a similar result in denying pre-sunrise authority to station WHCU, Ithaca, New York.[36] Moreover, we also relied on the growth of FM as a competitive market force in *Deregulation of Radio.*[37] We see no reason here to discount the significance of WNYC-FM's 3.16 mV/m contour as representing only an approximation of a station's primary reception area. Our rules use the contour for the purpose of determining the adequacy of a station's coverage.[38] Thus, in the absence of evidence demonstrating that WNYC-FM's reception is less than the 3.16 mV/m contour would indicate, we find that WNYC-FM adequately serves New York City.[39]

32. We also disagree with the ALJ on the degree of FM set penetration. Figures from the Electronic Industries Association[40] for 1979 indicate that nearly 75% of all home radios (*i.e.*, table, clock, and portable radios) and more than 50% of all automobile radios are capable of receiving FM. Recent Arbitron data[41] shows that FM accounts for more than half of the radio listening in New York City and that ten of the top twenty radio stations in New York City are FM stations. Thus, many of WNYC's

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[35] *See* cases cited *supra* notes 31–33. *See also McCormick Communications, Inc.* 68 FCC 2d 507, 509 (1978).

[36] *Presunrise Operation,* 18 FCC 2d 705 (1969).

[37] *Supra* note 34.

[38] *Supra* note 31.

[39] *See Moody Bible Institute of Chicago,* 45 RR 2d 190 (1979).

[40] Electronic Industries Association, *Electronic Market Data Book,* pp. 20–25 (1980). Official notice taken. *See* note 34, *supra.*

[41] Cited in Duncan, *American Radio Fall 80 Report* (1981). Official Notice taken. *See* note 34 *supra.*

listeners have FM receivers and could receive WNYC's SSA programming without serious disruption, even if that programming were shifted to WNYC-FM.[42]

33. Additionally, we do not agree with the significance the ALJ attributed to the fact that the AM and FM stations are independently programmed. Although it would be desirable for WNYC to have maximum flexibility in programming the two stations, the independent formats do not make WNYC-FM unavailable to compensate for loss of SSA authority. Separate programming reflects licensee discretion, Commission nonduplication policy,[43] and apparently NPR policy. There are no technical or legal obstacles to shifting programming from WNYC to WNYC-FM. Both stations are under the control of a common program manager.[44] Moreover, the record shows a significant amount of duplication between the AM and FM schedules. Simulcasting accounts for about 20% of the broadcast schedule[45] and substantial amounts of programming originating on the FM station are later rebroadcast on the AM station and vice versa.[46] In total, simulcasting accounts for at least two hours a day of WNYC's schedule with other forms of duplication accounting for another two hours.[47] Lessening of this duplication would mitigate the loss of SSA authority. We also observe that the loss of SSA authority may be further mitigated if WNYC replaced some of its classical music format with informational programming. As previously noted, other New York stations have classical music formats,[48] and the loss of entertainment programming does not raise the same public interest considerations as the loss of nonentertainment programming.[49]

E. Fair, efficient, and equitable distribution of radio service—Issue 15.

34. In summing up the public interest considerations involved in the preceeding issues, the ALJ concluded that considerations of fair, efficient, and equitable service favored granting WNYC's 50 kW nighttime proposal.[50] He concluded that the gains in service outweighed any loss of service. Although the ALJ recognized that this case is similar to *Iowa*

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[42] In reaching a similar conclusion in *Presunrise Operation*, *supra* note 36, noted that the listeners of WHCU were located in a relatively affluent community and would have sufficient advance warning to acquire FM receivers if they did not own them. 18 FCC 2d at 732.

[43] See Section 73.242 of the Rules.

[44] WNYC Exh. 72–6 at 2.

[45] WNYC Exh. 72–79. Prior to 1972 simulcasting was nearly 40%. WNYC Exh. 72–80.

[46] WNYC Exh. 72–74.

[47] WNYC Exhs. 72–7, 72–74, 72–79, 72–80.

[48] *Supra* note 29.

[49] *See FCC* v. *WNCN Listeners Guild*, 101 S.Ct. 1266 (1981).

[50] As previously noted, the 50 kW proposal causes less interference to WCCO and serves New York City more efficiently then WNYC's present 1 kW operation.

State, he fund that the cases are distinguishable. He believed it is significant that WOI served a rural area in which good FM reception could be assumed, while reception of WNYC-FM in New York City is uncertain. Thus, the ALJ found that the lack of an FM station as an adequate substitute for the AM proposal is a significant distinction between this case and *Iowa State*. Moreover, the ALJ noted that *Iowa State* did not involve a municipally owned station.

35. *Analysis*. As we have indicated in discussing the preceding issues, we disagree with the ALJ's assessment of the factors in this case bearing upon the fair, efficient, and equitable distribution of service. We acknowledge that WNYC's programming is highly meritorious and that termination of its nighttime operation, especially during the winter, when SSA hours occupy a larger portion of the broadcast schedule, would represent a significant loss to New York City. However, we must also take into consideration that nighttime operation by WNYC interferes with a substantial portion of the clear channel service provided by WCCO. Although we recently relaxed the protection accorded clear channel stations to some extent in the 1980 *Clear Channel Decision*,[51] we nevertheless have reaffirmed the importance of clear channel broadcasting by preserving the rules protecting clear channel stations from interference within their 0.5 mV/m 50% contours such as WNYC would impose on WCCO.

36. In view of the foregoing, we find it dispositive that WNYC's nighttime services is not essential to serve special needs and requirements as we have defined those terms in *Iowa State*. Other New York City stations provide substantial amounts of programming of the same general type, if not breadth and intensiveness as WNYC's. Most of WNYC's SSA programming would be equally effective if presented during daylight hours. Moreover, WNYC-FM is available to reschedule especially important programming at night.

37. It is also significant that New York City, although a uniquely large and diverse metropolis, has an exceptionally large complement of both commercial and noncommercial stations including WNYC-FM. By contrast the interference areas, including white and gray areas, are less well served. In addition, roughly equal numbers of people stand to gain or lose service depending on the resolution of this proceeding. All told, we conlcude that the limited AM operation as supplemented by the FM operation should be sufficient to meet the realistic special needs of New York City and that WNYC has not met the heavy burden of justifying a waiver of the fundamental allocation policy involved here.[52] Accordingly, we will deny WNYC's applications for nighttime 50 kw and 1 kw operating authority.

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[51] *Supra* note 2.

[52] *See WAIT Radio* v. *FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

III. WCCO's Proposed Tall Tower

A. Air hazard—Issue 14.[53]

38. WCCO seeks to move its antenna to Hamel, Minnesota, and to increase the antenna's height to 1195 feet above ground level (2195 feet above mean sea level). Because the proposed antenna is higher than 500 feet above ground level, the FAA conducted a study to determine whether the structure would be an air hazard.[54] The FAA found that the proposed antenna affected flight procedures in connection with Minneapolis-St. Paul International Airport, the city's major airport, 19 miles from Hamel, and seven satellite airports, serving mainly small aircraft. The FAA identified seven specific instrument assisted navigational procedures whose minimum altitudes would have to be increased by between 400 to 700 feet. In one instance, the direction of approach to an airport would also be affected. The FAA found that Victor 148, a flight path traversed by aircraft on their approach to the Minneapolis-St. Paul area airports would be adversely affected in certain instrument assisted navigational procedures. According to the FAA, WCCO's proposed tower would require aircraft using Victor 148 to observe a 400 foot higher minimum enroute altitute, eliminating in the process a "cardinal altitude."[55]

39. The FAA also found that WCCO's proposed tall tower would be located approximately one mile from State Highway 55 and a railroad track, used as landmarks by pilots navigating without the aid of instruments. In view of: (1) the heavy air traffic in the Minneapolis-St. Paul area,[56] and extensive student pilot training in the area; (2) the complexity of the procedural modifications necessitated in instrument landing procedures; and (3) the location of the proposed tower in an area otherwise free of obstructions; the FAA concluded that the tower was an air hazard with respect to both visual and instrument aircraft operations.[57]

40. WCCO's chief witness, Captain Paul A. Soderlind,[58] testified that significant changes in Minneapolis-St. Paul area flight procedures, occur-

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[53] SID at para. 427–566. *See also* NBAA Exh. 41, the report of the FAA regional office.

[54] In an aeronautical study the presumption is that a structure will have an adverse effect on instrument operations if the structure requires any changes in procedures or minimum flight altitudes. There is also a presumption that a structure will have an adverse effect on visual flight operations if as a result of its construction, any flight would be required to change course or altitude.

[55] The minimum enroute altitude along Victor 148 would be increased from 2800 feet to 3200 feet. Thus, the 3000 foot "cardinal altitude," (*i.e.*, altitudes spaced at 1,000 foot intervals for separation of aircraft) would no longer be available to aircraft using Victor 148.

[56] The traffic exceeds one million aeronautical operations a year in the Minneapolis-St. Paul area, including more than 50 operations a day on Victor 148.

[57] The Director of Air Traffic Services for the FAA affirmed the aeronautical study described above, which was prepared by a regional office. WCCO did not pursue an appeal.

[58] Soderlind is a former airline pilot with 40 years of flying experience and a consultant to a number of organizations including Boeing Aircraft and the FAA. His testimony is contained in WCCO Exh. 72–43.

ring after the FAA determination, undermined the FAA's rulings; and he otherwise attempted to minimize the significance of the adverse affects found by the FAA. Soderlind noted that in 1974, after the FAA rendered its decision, a terminal control area, which would be unaffected by the proposed tower, was established for Minneapolis-St. Paul International Airport. Moreover, under the FAA's "Keepem-High" program, large aircraft are kept substantially above the altitude floor for the terminal control area. Soderlind also dismissed the significance of the increase in minimum enroute altitude for Victor 148, which the FAA had, following its decision, increased to 3000 feet. According to Soderlind, the pertinent segment of Victor 148 is now little used, a 200 foot increase in minimum altitude from 3000 to 3200 feet is insignificant, irrespective of the loss of a cardinal altutude, and the existing minimum approach altitude could be maintained by a minor realignment of Victor 148. Similarly, Soderlind minimized themodifications of the various instrument navigational procedures noted by the FAA. Soderlind considered these of little operational significance. Soderlind believes that pilot training areas could be relocated.

41. Soderlind also minimized the impact of the proposed tower on visual procedures. He testified that a well lighted tower—in this case strobe lighted—could easily be sighted and avoided even under conditions of poor visibility. He believed that a prudent pilot would be familiar with the tower's location and even those using visual rules would use instruments to maintain a safe distance from the tower. In Soderlind's opinion, pilots would not use Route 55 as a navigational aid under poor weather conditions and that, in any event, the proposed tower was sufficiently far from Route 55 to prevent collisions. He also believed that the antenna's radio signal and strobe lighting would be useful navigational aids and that the proposed tower was less of a hazard than WCCO's existing tower.

42. Six pilots testified for the National Business Aircraft Association (NBAA9 and the Aircraft Owners and Pilots Association (AOPA). Jerrol T. Frederickson, an experienced airline pilot, agreed with Soderlind that the new antenna site will have little impact on airline operations except that the increase in minimum altitude used in various procedures may possibly result in slower traffic.[59] However, he reported that FAA employees at Minneapolis—St. Paul International Airport expressed concern that radiation from the WCCO tower could affect their instrument landing system and he favored use of an antenna farm.[60]

43. Other pilots[61] testified that flights involving general aviation aircraft, in contrast to those of the airlines, would be adversely affected by

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[59] Tr. 10675–76.

[60] Tr. 10680–83.

[61] John Boynton Bean, an expert in aircraft used by businesses; Curtis O. Ericson, a flight school and air taxi operator; Wallace C. Goodrich, an expert aerial navigation and obstruction evaluator; Lee John Gilligan, a flying school operator; and William S. Sadler, a private pilot and aviation equipment company executive. *See* Tr. 8403–9793.

the proposed tower. These witnesses testified that smaller aircraft, which are not required to use the terminal control area, often fly over the proposed site at low altitudes in order to avoid the terminal control area in which larger aircraft must operate.[62] The tower would force other small aircraft into the terminal control area where the larger clumsier aircraft operate, causing increased congestion. These witnesses also testified that the loss of the 3000 foot cardinal altitude for Victor 148 and vicinity would be significant because aircraft would be forced to use higher altitudes including the higher minimum 5000 foot cardinal altitude.[63] In the witnesses' opinion, use of the higher altitudes by small aircraft creates a significant hazard because of stresses of a more rapid descent[64] and the possibility of icing conditions. The witnesses also testified that the tower would pose a particular hazard to those aircraft navigating visually.[65] The witnesses felt that small aircraft would not use the tower as a navigational aid but would prefer to use Route 55 which passes near the tower.[66] They further believed that even with strobe lighting, visibility would be poor in some weather conditions.[67] The witnesses testified that small aircraft frequently do not possess instruments and that when they have instruments, the instruments may malfunction periodically.[68] The witnesses agreed that the tower would impose a particular burden on flight schools, which would have to undergo costly relocation or lose the opportunity for low altitude training in the vicinity of the tower.[69]

44. *Other Witnesses*. Three air traffic or obstruction specialists testified about the WCCO tower.[70] WCCO's witnesses testified that the changes in instrument procedures would not be significant,[71] that the tower would be highly visible, and that the visibility would be improved by the strobe lighting.[72] WCCO's witnesses observed the site and concluded that air traffic over it was light and the tower would not increase controller workload.[73] One WCCO witnessed testified that flight training could

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[62] Tr. 9732.

[63] East-West flights are assigned to operate at even cardinal altitudes, such as 4000 or 6000 feet. West-East flights are assigned to the odd altitudes. Thus with the loss of the 3000 foot cardinal altitude the minimum West-East altitude would be 5000 feet (Tr. 7590, 8598). Moreover, air traffic utilizing visual flight rules use cardinal altitudes plus 500 feet, and East-bound visual traffic would be forced to 5500 feet (Tr. 9110).

[64] Tr. 9793.

[65] Tr. 8611, 8632, 8811.

[66] Tr. 8529.

[67] Tr. 9807, 10052, 10069.

[68] Tr. 8580, 9839.

[69] Tr. 9208, 9220.

[70] Evans W. North, a former FAA official and pilot; and James E. Grambert, a former pilot and air traffic controller, testified for WCCO. Francis M. McDermott, an aeronautical consultant, testified for NBAA.

[71] WCCO Exh. 72–46; Tr. 11239.

[72] WCCO Exh. 72–46; Tr. 11270.

[73] Tr. 7483, 7824, 11240.

easily be moved to a new location where the tower would not be a problem.[74] The NBAA witness testified that the tower would require significant changes in procedures for small craft and that the increase in altitude would be a burden on traffic controllers.[75] He also testified that small aircraft would be forced to obtain sophisticated navigational equipment or abandon the area.[76] He considered traffic to be heavier in the area than did the WCCO witnesses and cited a collision in Washington, D.C. as an example of the hazard posed by WCCO's proposed tower.[77]

45. The ALJ concluded[78] that WCCO's proposed tall tower represented an unreasonable menace to aviation. The ALJ found that WCCO had not demonstrated its authority to use strobe lighting, which it proposed after the FAA determination had been made. He found that WCCO's land use permit from the city of Medina prohibited strobe lighting unless required by the FCC and that the FCC will not require strobe without an FAA recommendation in this regard.[79] In view of WCCO's heavy reliance on strobe lighting to establish the safety of the tower with respect to low altitude visual flights, he concluded the tower proposal would have to be rejected. However, the ALJ also concluded that even if strobe lighting were available, the proposed tower would be unacceptable. He found that the record conclusively established that the proposed tower would necessitate significant changes in aeronautical procedures. Although these changes would not have a significant impact on large aircraft used by the airlines, the impact on small aircraft would be substantial, and flight schools would be required to relocate their training areas. In this regard, despite a conflict in the testimony, the ALJ found that there is substantial use of both Victor 148 as an airway and State Highway 35 as a navigational guide. In view of the testimony by the witnesses representing small aircraft and flying schools, the ALJ believed that the hazard posed by the proposed tower could not be regarded as reasonable.

46. The ALJ found that there is no clear precedent for overruling an FAA air hazard determination. He noted that in *Streets Electronics, Inc.*,[80] the Commission disagreed with a hazard determination by a Regional Airspace Committee.[81] *Streets Electronics*, however, is distinguishable from the instant proceeding because the proposed tower did not require modification of any established air flight procedures.[82] The

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[74] Tr. 11448–11471.

[75] Tr. 9095–97.

[76] Tr. 9127.

[77] Tr. 10595–98. In January 1975 an airplane struck the radio tower at American University.

[78] SID at paras. 531–66.

[79] Citing *Antenna Structures*, 54 FCC 2d 30 (1975).

[80] 20 FCC 1121 (1956).

[81] The Regional Airspace Committees were federal interagency groups, established by Executive Order, which made advisory air safety determinations prior to the establishment of the FAA.

[82] 20 FCC at 1167–68

Commission found no basis for finding the tower would be an air hazard. In *Beacon Broadcasting System*,[83] a hearing examiner overturned a hazard determination by a Regional Airspace Committee. The ALJ distinguished *Beacon* because the only airport in the vicinity was a private airport with three dirt runways that is "not within a civil airway or designated air traffic control area." In *Beacon* the examiner was also able to find that the tower would not require the modification of any flight procedures or affect the approach or departures from the airport. In *WLCY-TV*,[84] the Commission upheld an FAA no hazard determination stating while it would independently review air hazard issues, it relies heavily on the FAA's expertise. Thus, citing *WLCY-TV* as precedent for relying on the FAA determination, and the testimony of the witnesses supporting that determination who were considered at least as credible as those opposing it, the ALJ concluded that "there is a reasonable possibility, if not certainty, that the tower proposed by WCCO would constitute a menace to air navigation.,"[85]

47. *WCCO's Exceptions*. WCCO contends that the FAA's hazard determination is of little significance since it was made by its Regional Office and has never been approved by the Administrator of the FAA. It argues that the FAA failed to find any specific adverse effect on safety when it found WCCO's proposed tower would be a hazard to aeronautical navigation. It asserts that the FAA uses the term "hazard" as a "term of art" dealing with the convenient and effective utilization of the air space as opposed to a synonym for the word "menace." The determination was also made without hearing or other due process and WCCO contends that it can only be sustained by the Commission if it is found by the Commission to be supported by record evidence.[86] WCCO argues that the Commission must make a *de novo* determination. Moreover, the hazard determination preceded the establishment of the terminal control plan for the Minneapolis-St. Paul International Airport and the "Keep-'em High" program, and as a result, WCCO maintains it may no longer have validity. WCCO concludes that most craft now would clear the tower by at least 1700 feet and the increase in minimum altitude will not affect any aircraft that is subject to the terminal control area floor.[87] Citing the testimony of its expert witnesses, WCCO concludes that the record supports a reversal of the hazard determination.

48. *The State of Minnesota's Exceptions*. Minnesota argues that the ALJ erred in his resolution of the air safety issue. It assures that the evidence establishes a high degree of good visibility flying weather; that

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[83] 34 FCC 872 (Adm. L.J. 1963).
[84] 38 FCC 2d 86 (1972).
[85] SID at para. 566.
[86] *Lincoln Operating Company*, 43 FCC 542 (1951).
[87] WCCO Exh. 72–43, para. 16, App. A, B, D.

the tower is readily visible; and that pilots flying visually should have no problems avoiding the tower. Minnesota agrees that the tower will cause some inconvenience to the owners of small aircraft, but contends that the inconvenience must be secondary to the needs for improved service, and the enhancement of ground safety from a wider area reception of WCCO's weather forecasts.

49. *NBAA's and AOPA's pleadings.* NBAA and AOPA contend that there is no legal basis for overturning the FAA hazard determination since the FAA regional hazard determination was appealed by WCCO and affirmed by the Director of Air Traffic Services for the Administrator of the FAA.[88] They argue that orders of the Administrator are subject to review in the Court of Appeals,[89] and that hazard determinations are final agency actions subject to judicial review.[90] Thus, since WCCO did not seek review, they conclude that the determination is a final agency order which can only be reversed by court appeal. In any event, they contend that it is Commission policy to place heavy reliance on an FAA hazard determination,[91] that the determination is supported by the record, and that even if approved by the Commission, the tower must still be approved by the FAA. Responding to the pleading of the State of Minnesota, AOPA asserts that there are many general aviation pilots who will be adversely affected by the tower, and that there is no evidence that the tower will result in an improvement in ground safety sufficient to offset the air hazard caused by the tower.

50. *Analysis.* The FAA is required to consult with and make recommendations to the FCC in order to minimize the hazards to air traffic from broadcast stations.[92] Concomitantly, the Commission's Rules provide that "Whenever a report is received from the FAA indicating that a proposed antenna structure is a hazard, the Commission will take further appropriate action."[93] In exercising its responsibilities under Section 309 of the Communications Act to find that a grant would serve the public interest, convenience and necessity, the Commission must consider all relevant matters including the height and location of proposed antenna structures. The Commission cannot delegate its Section 309 responsibilities, although an FAA determination or air safety issues is given deference where appropriate.[94] Thus, while the Commission usu-

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[88] NBAA Exh. 59.

[89] 49 U.S.C. 1486.

[90] *Airline Pilots and Owners Association*p.,NY,CIFAA, 600 F.2d 965 (D.C. Cir. 1979.

[91] *WLCY-TV*, 38 FCC 2d 86 (1972).

[92] 49 U.S.C. § 1712(d).

[93] Section 17.4(e) of the Commission's Rules. Commenting on Section 17.4(e), the Commission said it considers "the FAA report, as well as other public-interest factors, and, unless the matter is resolved through informal procedures" it will be designated for hearing. *Antenna Farm Areas*, 8 FCC 2d 559, 560 (1967).

[94] *Airplane Owner and Pilots Association* v. *FAA*, 600 F.2d 965, 973–74 (D.C. Cir. 1979).

ally follows FAA recommendations, we can overturn a determination or make a finding of non-hazard if we find that a tower will not unreasonably menace air traffic or require the modification of navigational procedures.[95]

51. We have conducted a *de novo* hearing on the air hazard issue and given full consideration to the FAA's air hazard determination. In view of the record evidence of the adverse effects which the proposed tower would have on aviation, WCCO carried a heavy burden to establishing that the tower would not be an air hazard.[96] Thus, in *WHAS, inc.*,[97] the Commission was not persuaded that a tower would not be an air hazard even though instrument procedures could be modified to remove any likelihood of collision, and the tower would be well lighted. The Commission was concerned about the reduction in airspace caused by the tower which increased the likelihood of collision, and the proximity of the tower to an area used for student pilot training. Here a finding of no hazard is precluded by credible testimony establishing a strong likelihood that WCCO's tower will have an adverse affect on air navigation.

52. Although WCCO has presented credible testimony in support of its position, it is amply rebutted by the testimony of witnesses opposing the tall tower. In particular they testified that smallplanes navigating visually along Route 55 would be required to fly within relatively close proximity to the tower, and that even with stobe lighting the tower may not be visible under all circumstances. We cannot conclude that the loss of minimum altitudes established by the FAA area are of no significance, especially in light of expert testimony on the undesirability of rapid descent and the danger of icing. Moreover, we are persuaded by the testimony that the establishment of the terminal control area tends to compress small aircraft traffic beneath and around the terminal control area into the vicinity of the tower, and would lead to the undesirable mixing of small and large aircraft within the terminal control area. Finally, the record establishes that the tower would adversely effect training flights in the area. Under these circumstances, we will deny WCCO's application for modification of its facilities because the proposed tower constitutes an unacceptable air hazard.

IV. Miscellaneous Issues

A. Cowles Condition.

53. In redesignating this case for hearing, the Commission noted that WCCO was among the holdings of the Cowles-Ridder broadcasting and

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[95] *WLCY–TV, supra; Streets Electronics, Inc., supra; see also, Antenna Structures*, 54 FCC 2d 30 (1975) and *Antenna Farm, Amarillo, Texas*, 20 FCC 2d 119 (1969).

[96] The designation order placed the burden of proof on WCCO. 33 FCC 2d at 290. *See also, WLCY, supra* at 90–91; *WHAS, Inc.* 31 FCC 237, 274 (1961).

[97] 31 FCC at 274.

publishing interests and that the qualifications of a related corporation, Cowles Broadcasting, Inc., (Cowles) to be a Commission licensee were at issue in Docket No. 19168.[98] Anticipating that the findings in Docket No. 19168 might reflect adversely on WCCO's qualifications, the Commission conditioned any grant to WCCO on the outcome of that proceeding. The ALJ citing the Commission's findings in *Cowles Florida Broadcasting, inc.*[99] found no issue was raised which would reflect on WCCO's qualifications and deleted the issue.[100] However, subsequently, in *Central Florida Enterprises* v. *FCC*,[101] the Court vacated and remanded the proceeding in Docket No. 19168, and the Bureau in its exceptions argued that the Cowles condition should be reinstated.

54. In the remanded consideration of the issues raised in Docket No. 19168 the Commission again found that misconduct by Cowles-Ridder nonbroadcasting subsidiaries did not reflect on Cowles' basic qualifications to be a licensee.[102] Thus, no issue is raised which would reflect on WCCO's qualifications and we will deny the Bureau's request to reinstate the Cowles condition.

B. WCCO's Petition for Order to Show Cause.

55. WCCO petitions for an order to compel WNYC to show cause why it should not accept a grant of an unlimited time station on 820 kHz. WNYC, at WCCO's behest, filed an application for 820 kHz when that frequency became available under the 1980 *Clear Channel Decision*. The petition is opposed by WNYC, the Bureau, and the Ohio State University which has filed a potentially mutually exclusive (with WNYC) application for new facilities on 820 kHz. WNYC's 820 kHz application is not part of this proceeding; there are at least 10 applications pending for new or modified facilities on 820 kHz which could be prejudiced by a grant to WNYC on that frequency; and WNYC's 820 kHz application cannot be granted without further processing. Thus, we will deny WCCO's Petition for Order to Show Cause.

56. ACCORDINGLY, IT IS ORDERED, That the Exceptions filed July 9, 1979, by the State of Minnesota, and July 10, 1979, by Midwest Radio-Television, Inc. (as predecessor of WCCO RAdio, Inc.), by the City of New York Municipal Broadcasting System, by the Chief, Broadcast Bureau, by the Aircraft Owners and Pilots Association, and by the National Business Aircraft Association, ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED.

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[98] 33 FCC 2d at 288–89. Docket No. 19168 involves Cowles' application for renewal of station WESH-TV, Dayton Beach, Florida.

[99] 60 FCC 2d 372 (1976), *recons. denied*, 62 FCC 2d 953 (1977).

[100] SID at para. 662.

[101] 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

[102] 86 FCC 2d 993 (1981), *affirmed sub nom. Central Florida Enterprises, Inc.* v. FCC, No. 81–1795 (D.C. Cir. July 13, 1982).

57. IT IS FURTHER ORDERED, That the application of the City of New York Municipal Broadcasting System for an extension of SSA authority and for a construction permit (File Nos. BSSA–266 and BP–16148) ARE DENIED.

58. IT IS FURTHER ORDERED, That the Application of WCCO Radio, Inc. for a construction permit (File No. BP–19151) IS DENIED.

59. IT IS FURTHER ORDERED, That the Petition for Order to Show Cause, filed April 10, 1981, by WCCO Radio, Inc. IS DENIED.

60. IT IS FURTHER ORDERED, That the Motion to Strike, filed May 7, 1981, by City of New York Municipal Broadcasting System IS DISMISSED as moot.

61. IT IS FURTHER ORDERED, That the City of New York municipal Broadcasting System IS AUTHORIZED, to continue operation broadcast station WNYC-AM under the existing temporary Special Service Authorization until 10:00 P.M., on the 91st day after the release of this Decision, PROVIDED, however, that if the licensee seeks judicial review of this Decision, IT IS AUTHORIZED to continue to operate the station pursuant to its Special Service Authorization until 90 days after judicial review is completed. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate except, in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and we are advised by the licensee that he intends to seek Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of of the instant applications, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*
September 23, 1982

STATEMENT OF
FCC COMMISSIONER JAMES H. QUELLO
DISSENTING IN PART

IN RE: THE CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM AM RADIO PROCEEDING

I must dissent to that part of the Commission's decision which denies nighttime operating authority to public broadcast station WNYC—ending almost 40 years of nighttime noncommercial service. I am convinced that the Administrative Law Judge correctly determined that WNYC's

nighttime operation has uniquely served the special needs and interest of its audience, and thus, I believe that this service should be permitted to continue.

This is a case where the Commission must exercise its responsibility to choose between conflicting valuable services. The majority recognizes that WNYC's programming is meritorious, but chooses to adhere strictly to its general technical standards. In my view, ample cause has been shown to retain all of WNYC's unique public-service oriented programming. In weighing these issues, I consider it particulary relevant that WNYC's nighttime operation causes no interference to the primary service area of station WCCO and that each area which might receive additional secondary service from WCCO is located within the secondary service area of at least 10 other clear channel stations.

As a final matter, I believe that the majority has erroneously relied on the fact that the meritorious programming of station WNYC theoretically could be shifted to co-owned staton WNYC-FM, a fulltime station. In fact, it is also possible that some other station in the market will take the opportunity to present any programming lost by cessation of WNYC's nighttime operations. The relevant question, however, is whether this meritorious programming will, in fact, be shifted to another station or whether it will instead be discontinued. The majority opinion implies an obligation on the part of WNYC's licensee to use any facility at its disposal to disseminate this valuable information. No such obligation exists, and there may be sound reasons why the licensee will choose to continue the present format of its FM facility. Should this occur, it is the Commission, and not the licensee, which has denied the citizens of New York access to unique programming which cleary served their special needs and interests.